

# Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918\*

JAMES MAY\*\*

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\*\* Associate Professor of Law, Washington College of Law, The American University. B.A. 1973, Carleton College; J.D. 1976, Harvard University. I am grateful to James Boyle and Andrew Popper for their helpful comments on an earlier draft. I thank Rosemarie Kelley, Jeffrey Karlin, Martha Knutson, Rita St. John Gunther, Carolyn Grigg, and Ann Dorigan for their valuable research assistance, Anne Guy for her expert production assistance, and the members of the Ohio State Law Journal for their patience and publication assistance. I especially thank Heather Huyck for her editorial suggestions and invaluable support. This research was generously assisted by The American University Washington College of Law Research Fund.

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## I. INTRODUCTION

Early antitrust analysis developed in a setting of enormous economic and political change. Between the close of the Civil War and the start of the First World War, American productive capacity soared, economic concentration and collusion increased tremendously, and conflict between labor and capital intensified greatly, as large-scale corporate capitalism increasingly displaced a familiar, decentralized small business economy.<sup>1</sup> These massive changes evoked varied responses from both jurists and legislators, as they did from Americans more generally.<sup>2</sup> In large measure, however, judges and legislators developed and applied their diverse approaches to antitrust and other issues within the broad theoretical confines of a widely accepted general frame of reference, which embodied certain fundamental perspectives on politics, economics, and judicial methodology.

Progressive Era judges commonly perceived themselves to be guardians<sup>3</sup> of a free political and economic order that naturally tended to produce harmonious, just, and optimal results for both individuals and society at large. State and federal jurists believed that this political and economic order was potentially threatened by the rapid and profound changes of the era and sought to meet this threat through continual,

1. See, e.g., M. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS* (1988); H. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 54-96, 235-308 (1955).

2. See *infra* text accompanying notes 199-266.

3. See, e.g., S. FINE, *LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT 1865-1901*, at 140 (1964); L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 361 (2d ed. 1985).

close scrutiny of public and private developments potentially subversive of the essential bases of American freedom and prosperity. Laissez-faire constitutionalism provided the theoretical vehicle for scrutiny of governmental developments. Above all other branches of contemporary adjudication, this body of jurisprudence most clearly reflected and reinforced the political and economic vision at the center of late nineteenth and early twentieth century judicial activity in general. In a very fundamental sense, Progressive Era antitrust analysis constituted the "flip side" of laissez-faire constitutionalism or, more accurately, its essential logical complement. While laissez-faire constitutionalism addressed the potential dangers arising from the most prominent governmental innovations of the time, antitrust analysis addressed the potential dangers arising from the most profoundly disturbing private innovations of the time. As a result of this complementarity, close examination of contemporary constitutional theory powerfully illuminates the theoretical foundations not only of Progressive Era constitutional jurisprudence, but also of early antitrust analysis as well.

This Article seeks to contribute to such illumination through an extensive exploration of historical developments that have been given little or no attention in most recent accounts of early antitrust history. Concentrating almost exclusively on federal developments,<sup>4</sup> leading antitrust scholars repeatedly have minimized the role of general economic philosophy in early antitrust analysis,<sup>5</sup> and have labeled particular formative era approaches the unfortunate, if predictable, outcome of ignorance of economic theory. For example, in describing the historical development of antitrust jurisprudence in his landmark book *The Antitrust Paradox: A Policy at War with Itself*,<sup>6</sup> Robert H. Bork has declared:

Law tends to arrive at basic answers before the right questions have been asked. Disputes that must be decided arise *before there is a theory to handle them*, so that the participants in the litigation often do not perceive the implications of a decision either way. By the time the *real* question is perceived, if it ever is, an answer has not only been given but has become dogma, and it is too late.<sup>7</sup>

As an earlier article explains at length, however, important aspects of the historical record severely undercut such a "theoretical vacuum" interpretation of early antitrust analysis.<sup>8</sup> The fact that this historical interpretation has generated so little scholarly dissent reflects an ongoing irony in current antitrust discourse.

4. On the relatively little scholarly attention to early state antitrust developments, see May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 498, 505 (1987).

5. See *id.* at 553-61, 589 & n.466 (discussing this interpretative tendency in leading recent accounts of antitrust history). For examples of this tendency, see, for instance, L. FRIEDMAN, *supra* note 3, at 465 (declaring that the Sherman Act "hardly reflected any coherent economic theory at all"); T. McCRAW, *PROPHETS OF REGULATION* 78 (1984) (stating that Americans fearful of the trusts had "only their personal sensibilities and traditional political ideologies to guide them"); Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1560 (1984) (declaring that "[n]ot until the antitrust synthesis of the 1940s fused Populist ideology with oligopoly learning did economic models define legal norms").

6. R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

7. *Id.* at 16 (emphasis added).

8. See May, *supra* note 4, at 541-93 (describing the nature and impact of contemporary economic theory in early antitrust analysis in the context of United States Supreme Court and state court treatment of constitutional challenges to state antitrust legislation). See also Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219 (1988); Peritz, *The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285 (1989).

After a decade of profound change in scholarly perspective,<sup>9</sup> judicial analysis,<sup>10</sup> and federal enforcement policy,<sup>11</sup> antitrust scholars still disagree vigorously over core antitrust goals and methods,<sup>12</sup> and continue to embrace diverse political and economic visions.<sup>13</sup> On the eve of the centennial of the passage of the Sherman Antitrust Act,<sup>14</sup> differing analysts still repeatedly invoke quite varied understandings of original congressional intent<sup>15</sup> and early doctrinal development<sup>16</sup> to buttress their respective approaches to modern antitrust law.

In significant part, the current diversity of historical interpretation persists, despite the constant emphasis on antitrust origins, because observers primarily concerned with modern federal antitrust issues have heavily de-emphasized the broader theoretical context within which early antitrust law developed. In doing so, antitrust scholars have left a highly valuable source of potential illumination and clarification relatively unexplored.

This Article seeks to provide a somewhat more complete picture of the nature of general theory in the Progressive Era and its impact on formative era antitrust

(examining the tension between competition and property logics in early congressional and judicial approaches to federal antitrust analysis).

9. See, e.g., Fox & Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936 (1987); Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985) [hereinafter Hovenkamp, *Antitrust Policy*].

10. See, e.g., Fox & Sullivan, *supra* note 9, at 954–56.

11. See, e.g., *id.* at 944–54; Pitofsky, *Comment: Antitrust in the Next 100 Years*, 75 CALIF. L. REV. 817, 818–27 (1987).

12. See, e.g., Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263 (1986) [hereinafter Arthur, *Farewell*]; Brietzke, *The Constitutionalization of Antitrust: Jefferson, Madison, Hamilton, and Thomas C. Arthur*, 22 VAL. U.L. REV. 275 (1988); Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696 (1986); Fox & Sullivan, *supra* note 9; Hovenkamp, *Antitrust Policy*, *supra* note 9.

13. See, e.g., Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. REV. 554 (1986); Hovenkamp, *Antitrust Policy*, *supra* note 9.

14. Sherman Antitrust Act, ch. 647, §§ 1–8, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (1982)). The Act became law on July 2, 1890.

15. Some scholars assert that Congress passed the antitrust laws to promote a number of economic, social, and political goals and that current practice should further all of these ends. See, e.g., 1 E. KINTNER, *FEDERAL ANTITRUST LAW* § 4.18 (1980); Fox, *supra* note 13, at 563–67, 584–85 (1986); Fox & Sullivan, *supra* note 9. Professor Robert Lande has urged that while Congress had multiple economic, social, and political goals in mind in 1890 and 1914, it primarily sought to attack unfair wealth transfers from consumers to sellers resulting from supracompetitive pricing, and in cases of conflict, subordinated all other goals to this primary aim. See Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 67 (1982). Scholars associated with the “Chicago School” of antitrust analysis contend that Congress should be understood to have established a single goal of “consumer welfare” optimality or societal wealth maximization, perhaps reflecting a budding appreciation of later twentieth century allocative efficiency insights. See, e.g., R. BORK, *supra* note 6, at 50–71, 91; Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 10–11 (1966); Easterbrook, *supra* note 12, at 1702–03. Finally, some scholars recently have adopted a “statutory” approach and argue that while knowledge of historical context and contemporary attitudes and values is essential, the question of Congress’ original general goals should be given less weight in current jurisprudence than is commonly urged. Instead, these scholars advocate a greater reliance on early congressional debate indications of the specific types of conduct most in the mind of congressmen in 1890 and 1914, finding particular congressional concern for price fixing, monopolistic mergers, predatory exclusion, or “cartelization.” See Arthur, *Farewell*, *supra* note 12, at 275, 285–89; Arthur, *Workable Antitrust Law: The Statutory Approach to Antitrust*, 62 TUL. L. REV. 1163 (1988) [hereinafter Arthur, *Workable Antitrust Law*]; Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 VAND. L. REV. 1125, 1126, 1129–31, 1136–38, 1140–421 (1985). See also *infra* text accompanying notes 354–56.

16. See, e.g., R. BORK, *supra* note 6, at 21–47; Arthur, *Farewell*, *supra* note 12, at 292–306; Brietzke, *supra* note 12, at 301–13; Goldschmid, *Horizontal Restraints in Antitrust: Current Treatment and Future Needs*, 75 CALIF. L. REV. 925, 926 (1987); Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 CALIF. L. REV. 835, 836–38 (1987).



analysis. The Article pursues this goal by broadening the usual focus of historical inquiry in two respects. First, as already noted, the Article explores the nature of laissez-faire constitutionalism in some detail, not only because of its complementary relation to early antitrust jurisprudence, but also because it offers a valuable “window” on the contemporary political and economic theory that was central to antitrust as well as constitutional analysis. Second, the Article explores the early impact of general theory not only in federal antitrust thinking, but also in state legislation and adjudication. State developments constituted a very important aspect of Progressive Era antitrust activity<sup>17</sup> that has long been neglected in scholarly accounts of the period.<sup>18</sup> Examination of these developments strikingly illuminates the nature of early antitrust analysis in general, and provides considerable insight into the interrelationship between laissez-faire constitutional thought and antitrust reasoning in the minds of Progressive Era judges who were intensely concerned with the growth and application of both of these bodies of jurisprudence. Following an examination of early congressional intent and federal antitrust jurisprudence, the latter portion of the Article accordingly focuses on the historical record in two state jurisdictions well known as unusually strong contemporary centers of both laissez-faire constitutionalism and antitrust adjudication: New York and Missouri.<sup>19</sup> The record of active development and implementation of both constitutional and antitrust analysis in these states greatly helps to highlight theoretical perspectives that were widely influential in contemporary federal and state antitrust analysis, but that were not always articulated as clearly or explicitly elsewhere.

Part II of this Article examines the nature, development, and pervasiveness of late nineteenth and early twentieth century laissez-faire constitutionalism. It describes the parallel and interconnected patterns of political and economic theory reflected in laissez-faire constitutional thought and the way that these theoretical perspectives shaped constitutional philosophy in general and concerns over unequal “class” legislation and paternalism in particular. This Part stresses the diversity of American views on contemporary political and economic change and the particularly strong commitments to traditional values and visions that judges maintained in the midst of altered social circumstances. It describes the major economic changes of the late nineteenth and early twentieth centuries, and then goes on to discuss the variety of traditional and nontraditional ways in which Americans responded to these changes and the manner in which early antitrust debate and agitation arose within this economic and intellectual setting.

Part III examines the influence of traditional political and economic theory in the congressional enactment of federal antitrust legislation in 1890 and 1914. This Part concludes that these political and economic principles established a powerful frame of reference for congressional antitrust analysis, and finds that recognition of this influence casts doubt on recent interpretations of original congressional intent.

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17. See *infra* text accompanying notes 433–38.

18. See May, *supra* note 4, at 497–98, 505.

19. See *infra* text accompanying notes 439–49, 609–66.

Part IV explores the impact of traditional theory in the thinking of the leading judicial theorists of early Sherman Act jurisprudence and places the leading analytical approaches of William Howard Taft, Rufus Wheeler Peckham, and Edward Douglass White within the larger context of contemporary political and economic thought and judicial methodology. Part V then offers an introduction to the examination of contemporary antitrust analysis in state courts and legislatures.

Part VI begins this examination of contemporary state analysis by exploring the judicial development of restraint of trade doctrine in New York and Missouri prior to the 1890 enactment of federal antitrust legislation. Finding that the courts in these states were far from unambiguously committed to a policy of competition by 1890, this Part stresses the variations in nineteenth century case law among states and over time. Part VII then examines popular, legislative, and executive responses to accelerating cartelization and concentration and notes the general extent and character of antitrust and restraint of trade litigation in New York and Missouri during the three decades following the passage of the federal Sherman Antitrust Act.

Part VIII explores the theory and practice of state antitrust and restraint of trade jurisprudence between 1890 and 1918. Detailing the state courts' strong support for antitrust policy in general, this Part examines the way that state judges sought to develop antitrust doctrine so as to protect basic rights of economic opportunity, property, and contract while at the same time seeking to promote economic competition, growth, and political freedom. Noting that state judges emphasized key ancillary/nonancillary restraint distinctions somewhat more than did the United States Supreme Court during these decades, Part VIII nonetheless finds state judges to have been less concerned with articulation of a single overall general standard of analysis than were contemporary Supreme Court jurists. This Part discusses the state courts' consistent condemnation of cartel behavior despite an increasingly ambivalent attitude toward tighter forms of economic combination. It then goes on to explain how the judges' rights-based orientation and strong commitment to competition powerfully shaped contemporary analyses of concerted refusals to deal, exclusive dealing, and resale price maintenance.

The Article finally concludes by exploring the growing divergence of constitutional and antitrust analysis since the First World War. This final section contrasts formative era theory with current antitrust analysis, and notes the relevance of early antitrust history in modern policy and practice.

## II. THE CONCEPTUAL CONTEXT OF FEDERAL AND STATE ANTITRUST ANALYSIS: LAISSEZ-FAIRE CONSTITUTIONALISM AND CONTEMPORARY POLITICAL AND ECONOMIC THEORY

### A. *State Power and Private Right in Contemporary Constitutional Adjudication*

The constitutional principles of substantive due process, economic liberty, and liberty of contract first gained strong support in state courts during the 1880s, achieved United States Supreme Court acceptance by the 1890s, and dominated

constitutional law doctrine thereafter for the remainder of the Progressive Era.<sup>20</sup> The jurists who embraced these core principles of "laissez-faire constitutionalism"<sup>21</sup> conceded the importance of both state power and private right and sought to clarify the legitimate, constitutional scope of both state authority and private freedom.

On the one hand, state and federal jurists upheld considerable regulatory authority. State courts<sup>22</sup> and the United States Supreme Court<sup>23</sup> repeatedly acknowledged traditional state police power to protect public health, safety, welfare, and morals. In addition, the Supreme Court consistently supported state authority to regulate the rates charged by businesses "affected with a public interest."<sup>24</sup> Indeed, the Court did so over loud and long conservative criticism of its decision in *Munn v. Illinois*,<sup>25</sup> which upheld state regulation of Chicago grain elevators constituting a "virtual monopoly" despite the fact that those ordinary, noncorporate firms had not been granted any special power or privileges by the state,<sup>26</sup> a precondition for rate regulatory power in the eyes of critics of the decision.<sup>27</sup>

On the other hand, late nineteenth century state and federal judges increasingly stressed the unconstitutionality of arbitrary government deprivation and redistribution of private property,<sup>28</sup> and enlarged the definition of property entitled to due process protection to include not only physical objects and land, but also an expanding range of intangible market interests and values.<sup>29</sup> By the 1890s the Supreme Court, for

20. Important discussions of the development and nature of these doctrines and related ideas include S. FINE, *supra* note 3, at 126-64; C. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW* (1954); A. KELLY, W. HARBISON & H. BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 397-418, 454-68 (6th ed. 1983); A. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895* (1960); Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 *LAW & HIST. REV.* 293 (1985); Hovenkamp, *The Political Economy of Substantive Due Process*, 40 *STAN. L. REV.* 379 (1988) [hereinafter Hovenkamp, *Political Economy*]; Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 *J. AM. HIST.* 751 (1967); McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 *J. AM. HIST.* 970 (1975); Pound, *Liberty of Contract*, 18 *YALE L.J.* 454 (1909). On property as "the central value of American constitutional policy" in this period, see Siegel, *Understanding the Lochner Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation*, 70 *VA. L. REV.* 187, 187 (1984).

21. On the ambiguities in the phrase, and the variations in its meaning as used by various scholars, see Jones, *supra* note 20, at 752; Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 *LAW & HIST. REV.* 249, 251 n.5 (1987). See also *infra* note 78 and accompanying text.

22. See, e.g., Urofsky, *State Courts and Protective Legislation during the Progressive Era: A Reevaluation*, 72 *J. AM. HIST.* 63, 67 & n.12 (1985) (describing the range of more or less expansive state court interpretations of the police power, but noting statements and holdings emphasizing the substantiality of the power made by even such relatively conservative state courts as those of Illinois and New York).

23. See, e.g., J. SEMONCHE, *CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920*, at 77-78 (1978).

24. See, e.g., C. JACOBS, *supra* note 20, at 164; J. SEMONCHE, *supra* note 23, at 22; Siegel, *supra* note 20, at 206 & n.85.

25. 94 U.S. 113 (1877).

26. See *id.* at 130-31.

27. On the doctrinal controversy, which persisted for more than 50 years, see McCurdy, *supra* note 20, at 995-98; Siegel, *supra* note 20, at 199-207.

28. See, e.g., *Stone v. Farmers' Loan and Trust Co.*, 116 U.S. 307, 331 (1886); *Davidson v. New Orleans*, 96 U.S. 97, 102 (1878); *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 664 (1875); S. FINE, *supra* note 3, at 141, 143; A. KELLY, W. HARBISON & H. BELZ, *supra* note 20, at 405; Benedict, *supra* note 20, at 323, 325, 331.

29. See, e.g., S. FINE, *supra* note 3, at 141, 150; C. JACOBS, *supra* note 20, at 24-25; M. SKLAR, *supra* note 1, at 49; Siegel, *supra* note 20, at 210-12; Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 *BUFFALO L. REV.* 325 (1980).

example, held that due process of law required judicial review of rates set by regulatory bodies<sup>30</sup> or by legislatures<sup>31</sup> themselves, in order to ensure not only fair procedure, but also the "substantive" right to a "reasonable" level of financial return on investment approximating competitive free market value.<sup>32</sup>

Constitutional due process protection for the reasonable earnings of regulated businesses formed part of a broader pattern of due process protection for economic gains and opportunity. Many of the essential elements of this more general conception of economic freedom received powerful early expression in the United States Supreme Court in Justice Stephen Field's seminal 1884 concurring opinion in the case of *Butchers' Union Slaughter-House & Live Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*<sup>33</sup> In condemning a state grant of monopolistic slaughterhouse privileges, Justice Field repeated the themes of his earlier *Slaughterhouse Cases* dissent,<sup>34</sup> and emphasized the interrelationship of liberty, labor, and property. Justice Field stressed that the inalienable rights proclaimed in the Declaration of Independence<sup>35</sup> included

the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment.<sup>36</sup>

Proclaiming the centrality of this aspect of American freedom, Justice Field drew support from the words of Adam Smith in *The Wealth of Nations*:<sup>37</sup>

It has been well said that, "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. . . ."<sup>38</sup>

Beginning in the mid-1880s, state courts increasingly invoked Justice Field's Supreme Court sentiments,<sup>39</sup> the kindred opinions of Justice Joseph Bradley,<sup>40</sup> existing similar state court precedents,<sup>41</sup> and the scholarly work of Thomas M.

30. See *Reagan v. Farmers' Loan and Trust Co.*, 154 U.S. 362 (1894); *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418 (1890).

31. See *Smyth v. Ames*, 169 U.S. 466 (1898).

32. See, e.g., A. KELLY, W. HARBISON & H. BELZ, *supra* note 20, at 407; Siegel, *supra* note 20, at 231-32. On the change from a largely procedural to an increasingly substantive interpretation of due process more generally, see S. FINE, *supra* note 3, at 141, 150; J. SEMONCHE, *supra* note 23, at 16-23. But cf. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 59 (1987) [hereinafter Horwitz, *Republicanism and Liberalism*] (stressing the continuities in early and late nineteenth century constitutional thought in general). On the competitive free market value measure of property rights, see also *infra* note 147.

33. 111 U.S. 746, 754-60 (1884) (Field, J., concurring).

34. 83 U.S. (16 Wall.) 36, 83-111 (1873) (Field, J., dissenting).

35. The Declaration of Independence para. 2 (U.S. 1776).

36. *Butchers' Union*, 111 U.S. at 757 (Field, J., concurring).

37. A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

38. *Butchers' Union*, 111 U.S. at 757 (Field, J., concurring) (quoting A. SMITH, *supra* note 37, at bk. I, ch. 10).

39. See, e.g., S. FINE, *supra* note 3, at 150; A. PAUL, *supra* note 20, at 13.

40. See, e.g., S. FINE, *supra* note 3, at 160; C. JACOBS, *supra* note 20, at 52, 55, 66, 96, 161.

41. See, e.g., *In re Jacobs*, 98 N.Y. 98, 106, 107 (1885) (citing the earlier decisions in *Bertholf v. O'Reilly*, 74 N.Y. 509 (1878), and *Wynehamer v. People*, 13 N.Y. 378 (1856)).

Cooley<sup>42</sup> and Christopher G. Tiedeman,<sup>43</sup> to support establishment of a thoroughgoing laissez-faire constitutionalism as the standard for judging social and economic legislation. In numerous cases over the next two to three decades,<sup>44</sup> state high courts again and again proclaimed the fundamentality of private property protection and economic opportunity, along with the related, newly formulated principle of liberty of contract.<sup>45</sup>

The United States Supreme Court fully accepted these due process principles as mainstream doctrine by the close of the 1890s.<sup>46</sup> Justice Rufus Peckham, for a unanimous Court, gave famous expression to the new orthodoxy when he explained, in *Allgeyer v. Louisiana*,<sup>47</sup> that the term "liberty" as used in the fourteenth amendment<sup>48</sup>

means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.<sup>49</sup>

For federal and state jurists who thus conceded the fundamental importance of both state regulatory power and private economic freedom, the critical question became one of definition and scope: What restrictions on private possession and activity were within the limits of state power, and which restrictions went beyond those limits and infringed upon constitutionally protected private property and economic liberty? Judicial efforts to resolve this recurring, central question implicated additional related questions regarding the respective institutional roles of courts and legislatures and the perceived dangers of government activism.

Repeatedly, when social and economic legislation was challenged, state and federal jurists sought to determine whether particular measures were legitimate, "real" exercises of state police power or simply a guise<sup>50</sup> for unequal "class" or

42. See, e.g., S. FINE, *supra* note 3, at 151–52; C. JACOBS, *supra* note 20, at 27–32, 49, 64, 161; Jones, *supra* note 20. Cooley's often-cited treatise, which ultimately went through eight editions, see C. JACOBS, *supra* note 20, at 29, first appeared in 1868 as T. COOLEY, *TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (1868).

43. See, e.g., S. FINE, *supra* note 3, at 152–54; C. JACOBS, *supra* note 20, at 58–63, 64, 161. Professor Tiedeman's treatise was first published in 1886 as C. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES* (1886).

44. Leading state cases included, e.g., *Ritchie v. People*, 155 Ill. 98, 40 N.E. 454 (1895); *Millett v. People*, 117 Ill. 294 (1886); *Commonwealth v. Perry*, 155 Mass. 117, 28 N.E. 1126 (1891); *State v. Julow*, 129 Mo. 163, 31 S.W. 781 (1895); *State v. Loomis*, 115 Mo. 307, 22 S.W. 350 (1893); *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911); *People ex rel. Rodgers v. Coler*, 166 N.Y. 1, 59 N.E. 716 (1901); *In re Jacobs*, 98 N.Y. 98 (1885); *Godcharles & Co. v. Wigeman*, 113 Pa. 431, 6 A. 354 (1886); *State v. Goodwill*, 33 W. Va. 179, 10 S.E. 285 (1889), *overruled in* *White v. Raleigh Wyo. Mining Co.*, 113 W. Va. 522, 168 S.E. 798 (1933).

45. An explicit articulation of the principle of liberty of contract reportedly first appeared in an 1884 Illinois Supreme Court opinion, *Jones v. People*, 110 Ill. 590 (1884). See C. JACOBS, *supra* note 20, at 44.

46. On the Supreme Court's acceptance of these doctrines in the 1890s, see, for example, S. FINE, *supra* note 3, at 149; C. JACOBS, *supra* note 20, at 85–93.

47. 165 U.S. 578 (1897).

48. U.S. CONST. amend. XIV.

49. *Allgeyer*, 165 U.S. at 589.

50. See, e.g., *Lochner v. New York*, 198 U.S. 45, 56, 61, 64 (1905); *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

"special" legislation<sup>51</sup> constituting favoritism toward a particular majority or minority group, pernicious redistribution,<sup>52</sup> and, perhaps, misguided paternalism.<sup>53</sup> In seeking to make such judgments, federal and state jurists strikingly exhibited both "activism" and "restraint."

On the one hand, as due process challenges proliferated, contemporary federal and state judges greatly expanded their review of legislative activity and struck down an unprecedented number of statutes.<sup>54</sup> Moreover, contemporary jurists did act innovatively in elaborating such constitutional doctrines as substantive due process and liberty of contract.<sup>55</sup> To many observers, federal and state judges also appeared to act legislatively when they undertook their own reexaminations of factual contexts to determine whether particular statutes were reasonable in their purposes and in the means chosen to achieve those purposes.<sup>56</sup> To a very large extent, however, federal and state judges continued to assert, and to believe, that their role remained a fundamentally nondiscretionary one: to determine the limits of relevant legislative powers and individual rights in order to distinguish "real" exercises of such powers and rights from mere sham and aggression.<sup>57</sup>

The famous case of *Lochner v. New York*<sup>58</sup> provides a good illustration. In that case, the Supreme Court reexamined the factual context of bakeshop conditions in order to determine whether a state maximum hours law was

a fair, reasonable and appropriate exercise of the police power of the State, or . . . an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family[.]<sup>59</sup>

(Harlan, J., for the Court, declaring: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses"); *State v. Julow*, 129 Mo. 163, 177, 31 S.W. 781, 783 (1895); *In re Jacobs*, 98 N.Y. 98, 110 (1885) (declaring "under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive"); S. FINE, *supra* note 3, at 161; C. JACOBS, *supra* note 20, at 27, 161; Siegel, *supra* note 20, at 210 n.107. Similarly, in striking down a federal statute prohibiting carriers in interstate commerce from entering into anti-union "yellow dog contracts," the Court stressed that the statute was passed "under the guise of regulating interstate commerce." *Adair v. United States*, 208 U.S. 161, 180 (1908).

51. See, e.g., *State v. Loomis*, 115 Mo. 307, 315-16, 22 S.W. 350, 351-52 (1893); S. FINE, *supra* note 3, at 160; Benedict, *supra* note 20, at 298, 304-31.

52. See, e.g., Benedict, *supra* note 20, at 305; Horwitz, *Progressive Legal Historiography*, 63 OR. L. REV. 679, 684 (1984) [hereinafter Horwitz, *Progressive Legal Historiography*]; Hovenkamp, *Political Economy*, *supra* note 20, at 386.

53. See, e.g., *Budd v. New York*, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting, declaring, "The paternal theory of government is to me odious"); *State ex. rel. Garth v. Switzler*, 143 Mo. 287, 322-23, 45 S.W. 245, 251 (1898) (Ganitt, C.J., for the court, declaring "[p]aternalism is a plant that should receive no nourishment upon the soil of Missouri"); *Godcharles & Co. v. Wigeman*, 113 Pa. 431, 437, 6 A. 354, 355-56 (1886); *State v. Goodwill*, 33 W. Va. 179, 186, 10 S.E. 285, 287 (1889), *overruled in White v. Raleigh Wyo. Mining Co.*, 113 W. Va. 522, 168 S.E. 798 (1933); Soifer, *supra* note 21.

54. See, e.g., L. FRIEDMAN, *supra* note 3, at 345, 355-56, 358-63.

55. See, e.g., S. FINE, *supra* note 3, at 141, 150; Hovenkamp, *Political Economy*, *supra* note 20, at 383. *But cf.* Benedict, *supra* note 20, at 326, 331 (stressing the continuities in early and later nineteenth century constitutional thought); Horwitz, *Republicanism and Liberalism*, *supra* note 32, at 59 (same).

56. See, e.g., A. KELLY, W. HARBISON & H. BELZ, *supra* note 20, at 415-16, 455-58.

57. On the nondiscretionary ideal in contemporary jurisprudential theory, see McCurdy, *supra* note 20, at 973, 982-83, 987, 995; Siegel, *supra* note 20, at 192-93. See also, e.g., *Louisville & Nashville R.R. v. Kentucky*, 161 U.S. 677, 701 (1896) (reiterating that in the exercise of its police power, "the legislature is vested with a large discretion, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry").

58. 198 U.S. 45 (1905).

59. *Id.* at 56.

In striking down the law, however, Justice Peckham, for the Court, stressed:

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.

. . . .

It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.<sup>60</sup>

This “nondiscretionary,” sharp separation of the sphere of state police power from the realm of private right paralleled similar contemporary efforts to establish the line separating federal commerce authority from state police power,<sup>61</sup> and to fix the border between the respective rights of one private citizen and those of another.<sup>62</sup> Forswearing ostensibly more discretionary balancing of interests and policies, jurists adhering to such a conception of their role envisioned the critical task of boundary demarcation as an essentially “objective” process based largely on deduction from settled fundamental principles that were inductively discoverable, for example, in the established body of common law or the Constitution itself.<sup>63</sup> As time went on, critics on and off the bench increasingly questioned such jurisprudential ideals, particularly as it became more and more clear that formalistic techniques of boundary definition could be readily adapted to justify quite different and inconsistent delineations of state power and of private rights.<sup>64</sup> Over time, such mounting skepticism prompted increasing acceptance and utilization of various interest-balancing approaches instead of techniques of formal categorization.<sup>65</sup> On a more theoretical level, these doubts generated the alternative perspectives of “sociological jurisprudence” and, ultimately, the legal realism of the 1920s and 1930s.<sup>66</sup> During the Progressive Era itself,

60. *Id.* at 56–58.

61. *See, e.g.,* *United States v. E.C. Knight Co.*, 156 U.S. 1, 13 (1895):

It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed . . . and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

62. *See, e.g.,* Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* 70, 87–98 (G. Geison ed. 1983); Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 *RES. L. & SOC'Y* 3 (1980) [hereinafter Kennedy, *Classical Legal Thought*]. *See also, e.g.,* *infra* text accompanying notes 836–1066 (discussing judicial efforts to delineate respective rights in cases challenging various concerted refusals to deal and vertical agreements).

63. *See, e.g.,* Gordon, *supra* note 62, at 88–89; Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW* 24 (D. Kairys ed. 1982); Siegel, *supra* note 20, at 193.

64. *See, e.g.,* Gordon, *supra* note 62, at 94, 106; Kennedy, *Classical Legal Thought*, *supra* note 62, at 12–14 (discussing the different results reached by Justices Peckham and Harlan in *Lochner*, despite their acceptance of a common conceptual framework).

65. *See, e.g.,* Gordon, *supra* note 62, at 94; Horwitz, *Progressive Legal Historiography*, *supra* note 52, at 686.

66. On sociological jurisprudence, see A. KELLY, W. HARBISON & H. BELZ, *supra* note 20, at 466–67. On legal

however, the nondiscretionary ethic and the tendency to think in terms of separate spheres of powers and rights retained considerable power for a great many jurists.

In general, state judges not only developed these theoretical and methodological tenets of laissez-faire constitutionalism earlier, but also pushed their application somewhat further than did the United States Supreme Court,<sup>67</sup> at least prior to the 1920s.<sup>68</sup> Moreover, individual judges varied considerably in their specific application of these principles, reflecting at least in part varying sympathies toward labor or business, or toward government regulation in general.<sup>69</sup> State and federal jurists did declare unconstitutional a disproportionate number of labor statutes.<sup>70</sup> Yet, state and federal decisions never displayed a rigidly probusiness bias.<sup>71</sup> Contemporary state and federal judges rejected the great majority of constitutional challenges they considered<sup>72</sup> and, indeed, upheld most labor enactments as well,<sup>73</sup> except for explicitly pro-union measures such as bans on "yellow dog contracts."<sup>74</sup> State courts, moreover, displayed markedly increased tolerance for progressive legislation as time went on.<sup>75</sup>

Despite such judicial diversity and change, however, laissez-faire constitutional theory never ceased to define the relevant agenda of issues and principles in Progressive Era constitutional adjudication.<sup>76</sup> Widely differing jurists continued to accept the legitimacy of the core principles of substantive due process, economic liberty, and liberty of contract even as they debated their application and increasingly found challenged legislation to be in harmony with them.<sup>77</sup> In other words, while contemporary courts did not embody strident "laissez-faire" hostility to legislative innovation, they consistently did adhere to "laissez-faire constitutionalism" as it refers to the body of jurisprudential theory based on the core principles of substantive due process, economic liberty, and liberty of contract.<sup>78</sup> This continuity in constitutional theory reveals a great deal about contemporary jurisprudence more generally,

realism, see E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 159-78 (1973).

67. See, e.g., C. JACOBS, *supra* note 20, at 39, 49, 85, 93.

68. On the conservative shift in United States Supreme Court constitutional opinions during the 1920s, see A. KELLY, W. HARBISON & H. BELZ, *supra* note 20, at 462-64; A. PAUL, *supra* note 20, at 228; J. SEMONCHE, *supra* note 23, at 419-26.

69. See, e.g., C. JACOBS, *supra* note 20, at 84; Urofsky, *supra* note 22, at 65-67, 88-91.

70. See, e.g., C. JACOBS, *supra* note 20, at 64.

71. See, e.g., L. FRIEDMAN, *supra* note 3, at 362; Benedict, *supra* note 20, at 296-98, 311, 331; Hovenkamp, *Political Economy*, *supra* note 20, at 386-90.

72. See, e.g., L. FRIEDMAN, *supra* note 3, at 360-63; C. JACOBS, *supra* note 20, at 24; A. KELLY, W. HARBISON & H. BELZ, *supra* note 20, at 416; J. SEMONCHE, *supra* note 23, at 424-34; Urofsky, *supra* note 22.

73. See, e.g., Urofsky, *supra* note 22, at 89.

74. See, e.g., J. SEMONCHE, *supra* note 23, at 430-31; Urofsky, *supra* note 22, at 90.

75. See, e.g., C. JACOBS, *supra* note 20, at 93-94; Urofsky, *supra* note 22, at 81-82.

76. See, e.g., C. JACOBS, *supra* note 20, at 24; A. KELLY, W. HARBISON & H. BELZ, *supra* note 20, at 454, 455-56; A. PAUL, *supra* note 20, at 235-36.

77. See, e.g., sources cited *supra* note 76. See also *Adair v. United States*, 208 U.S. 161, 174 (1908) (Harlan, J., for the Court, stressing that while the members of the Court had disagreed over the final result in *Lochner*, they did not dispute the principle of liberty of contract itself).

78. The confusion in terminology apparently arose because "Progressive" historians used the term "laissez-faire constitutionalism" to stress the conservatism and believed antigovernment, probusiness bias of late nineteenth and early twentieth century jurists. The phrase has continued in use even though recent scholarly writing has challenged the Progressive historians' interpretation of judicial biases. See, e.g., Horwitz, *Progressive Legal Historiography*, *supra* note 52.



for laissez-faire constitutionalism embodied and strongly reinforced political, economic, and methodological perspectives whose power extended far beyond the realm of constitutional adjudication itself.

## B. *Political and Economic Perspective in Contemporary Jurisprudence*

### 1. *The Interrelation of Political and Economic Theory*

Public and private law jurisprudence during the Progressive Era simultaneously reflected both the libertarian ideals of nineteenth century American political liberalism<sup>79</sup> and the main themes of American classical economic theory.<sup>80</sup> While historians and legal scholars continue to debate the relative influence of these two traditions,<sup>81</sup> it ultimately is not possible to explain contemporary legal theory in general, or laissez-faire constitutionalism in particular, as fundamentally the product of one of these two bodies of thought rather than the other. The two traditions cannot be segregated from each other because American classical economic theory was not merely implicitly,<sup>82</sup> but explicitly and centrally, a libertarian philosophy.

American political liberalism was most broadly premised on a belief in the inherent right of individuals to maximum freedom of thought and action consistent with the equal rights of others, and it asserted that a political system fully recognizing these rights was optimal for both individuals and society as a whole.<sup>83</sup> Americans always conceived of economic autonomy and opportunity as an important aspect of this broader freedom of thought and action,<sup>84</sup> and American politics focused prominently on economic issues and principles throughout the nineteenth century.<sup>85</sup> For Americans concerned with questions of economic policy and development, classical economics offered a powerful central vision of rights and economic freedom that paralleled and extended the central, more general vision of political liberalism.

79. See, e.g., Benedict, *supra* note 20.

80. See, e.g., C. JACOBS, *supra* note 20, at 24; Hovenkamp, *Political Economy*, *supra* note 20.

81. Historians and legal scholars continue to disagree over the relative impact of political and economic theory in Progressive Era legal thought and continue to accept one or the other as the dominant causative force. For example, some scholars have posited that constitutional law scrutiny of state regulation and, particularly, condemnation of unequal "class" or "special" legislation rested on a "libertarian rather than economic basis." Benedict, *supra* note 20, at 304. Others have argued, conversely, that such constitutional principles were "fundamentally about economic theory, not about imperfections in the legislative process." Hovenkamp, *Political Economy*, *supra* note 20, at 393.

82. See Benedict, *supra* note 20, at 298, 305.

83. On the varieties of liberalism and the changes in liberal thought over time, see, for example, L. HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955); R. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* (1985); R. UNGER, *KNOWLEDGE AND POLITICS* 63-103 (1984); Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987); Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

84. See, e.g., Kloppenberg, *supra* note 83, at 15-16, 26-29 (discussing various liberal conceptions of the nature and importance of economic autonomy and opportunity and the changes in these conceptions over time).

85. See R. HOFSTADTER, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188, 205 (1965) [hereinafter R. HOFSTADTER, *Antitrust Movement*]. See also, e.g., S. FINE, *supra* note 3, at 3-25 (discussing pre-Civil War developments); M. KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 162-96, 371-408 (1977) (discussing post-Civil War developments).

## 2. *The Natural Laws and Just Harmonies of Classical Economics*

Although American classical economic writers repeatedly disagreed on various analytical details, they agreed that economic life was based on the operation of a small number of fundamental, natural laws,<sup>86</sup> which they frequently equated with divine law as well.<sup>87</sup> Three laws played a particularly important role in the deductive science<sup>88</sup> of Political Economy.<sup>89</sup> Classical economic writers insisted, first, that an individual's labor gave that person a natural property right in whatever he or she produced. As Wayland and Chapin's economics textbook,<sup>90</sup> the college textbook most widely read in later nineteenth century America,<sup>91</sup> explained:

*The exertion of labor establishes a right of Property in the fruits of labor, and the idea of exclusive possession is a necessary consequence. Personal rights begin with the consciousness of individual being and of individual achievement; and the idea of labor expended in the production underlies directly or indirectly the property-right to anything. Originally the thing produced belongs to him who produced it by an intuitive conception of right, and the act of appropriation is as instinctive as the act of breathing.*<sup>92</sup>

The presence of such individual property rights laid the foundation for the operation of the second crucial natural law, the "*possibility and the right of Exchange.*"<sup>93</sup>

86. On American classical economic thought, see, for example, 3 J. DORFMAN, *THE ECONOMIC MIND IN AMERICAN CIVILIZATION* (1949) (reviewing classical as well as other variants of American economic thought between 1865 and 1918); S. FINE, *supra* note 3, at 5-18, 47-79. Wayland and Chapin's leading text, for example, declared that all of economic science was based on only "four fundamental laws," which it specified in the space of four short paragraphs. See F. WAYLAND, *THE ELEMENTS OF POLITICAL ECONOMY* 4-6 (recast by A. Chapin 1878). While classical economists shared a natural law orientation, they disagreed somewhat in their precise description and enumeration of such laws. For example, Julian M. Sturtevant declared that economic science ultimately was based on the single fundamental law that "[e]very man owns himself, and all which he produces by the voluntary exertion of his own powers." J. STURTEVANT, *ECONOMICS OR THE SCIENCE OF WEALTH* 1 (1877). At other points in his text, however, Sturtevant referred to additional, related natural laws as well. See, e.g., *id.* at 8, 50, 147. See also, e.g., A. WALKER, *THE SCIENCE OF WEALTH: A MANUAL OF POLITICAL ECONOMY. EMBRACING THE LAWS OF TRADE, CURRENCY, AND FINANCE* 23 (7th ed. 1874).

87. See, e.g., S. FINE, *supra* note 3, at 52; H. WOOD, *THE POLITICAL ECONOMY OF NATURAL LAW* 19 (1894) (declaring "Natural Law is but another name for the methods of the Creator"); Benedict, *supra* note 20, at 299; Hovenkamp, *Political Economy*, *supra* note 20, at 419-20.

88. Classical economic writers repeatedly stressed the genuinely scientific nature of the field. See, e.g., F. WAYLAND, *supra* note 86;

*Political Economy is that branch of Social Science which treats of the production and application of wealth to the well-being of men in society. It is a branch of true science.*

*By Science, as the word is here used, we mean a Systematic arrangement of the laws which God has established, so far as they have been discovered, of any department of human knowledge.*

*Id.* at 4. See also, e.g., P. BOLLER, *AMERICAN THOUGHT IN TRANSITION: THE IMPACT OF EVOLUTIONARY NATURALISM, 1865-1900*, at 71-73 (1969); F. BOWEN, *THE PRINCIPLES OF POLITICAL ECONOMY APPLIED TO THE CONDITION, THE RESOURCES, AND THE INSTITUTIONS OF THE AMERICAN PEOPLE* 3 (3d ed. 1863); S. NEWCOMB, *PRINCIPLES OF POLITICAL ECONOMY* 21 (1886); J. STURTEVANT, *supra* note 86, at 1, 52; A. WALKER, *supra* note 86, at 4; H. WOOD, *supra* note 87, at 16-17.

89. During the Progressive Era, the field of economic writing continued to be designated as "Political Economy," indicating not only the study of economic relations within the political, as opposed to household, unit, see F. WAYLAND, *supra* note 86, at 3-4, but also at least connoting the substantial interrelationship of political and economic issues. See, e.g., A. PERRY, *ELEMENTS OF POLITICAL ECONOMY* 66-67 (1873); M. SKLAR, *supra* note 1, at 6.

90. F. WAYLAND, *supra* note 86.

91. See R. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 145 (rev. ed. 1959) [hereinafter R. HOFSTADTER, *SOCIAL DARWINISM*].

92. F. WAYLAND, *supra* note 86, at 5. See also, e.g., J. STURTEVANT, *supra* note 86, at 1-3.

93. F. WAYLAND, *supra* note 86, at 5. On the centrality of exchange in contemporary political economy, see A. PERRY, *supra* note 89, at 1 ("Political Economy is the *Science of Exchanges*, or, what means just the

The unimpeded operation of these two natural laws generated tremendous individual and social benefits. The individual parties to each free exchange both necessarily gained from it, or else would not have participated in the exchange.<sup>94</sup> Society as a whole gained as the number of mutually beneficial transactions multiplied.<sup>95</sup>

Exchange activity multiplied greatly through specialization and division of efforts. Each individual benefitted by concentrating on what he or she could do best, producing as much of that good or service as possible, and then exchanging it for desired goods or services produced more efficiently by others.<sup>96</sup> Such specialization spurred innovation<sup>97</sup> and expanded output,<sup>98</sup> and thus made possible a maximum number of exchanges.<sup>99</sup> Consequently, it not only enlarged individual gains but also dramatically magnified national prosperity as well.<sup>100</sup>

Within this natural economic world of unimpeded production and exchange, the disparate interests of consumers, capital, and labor were coordinated and ultimately harmonized through the operation of the powerful and pervasive natural law of competition. Francis A. Walker, president of the Massachusetts Institute of Technology<sup>101</sup> and the first president of the American Economic Association,<sup>102</sup> expressed well the centrality of this force when he declared that "rightly viewed, perfect competition would be seen to be the order of the economic universe, as truly as gravity is the order of the physical universe, and to be not less harmonious and beneficent in operation."<sup>103</sup>

Although economic scholars often insisted that economics was a positive, and not a normative, science,<sup>104</sup> both academic and popular texts repeatedly asserted that freely competitive production and exchange powerfully tended to produce just results consonant with God's will and the dictates of morality.<sup>105</sup> As long as individuals were not impeded in their free pursuit of economic opportunity,<sup>106</sup> abnormally high prices and returns temporarily prevailing in any particular market would attract new entrants. Such new entry would expand available supply, intensify horizontal

same, the *Science of Value*."). See also S. NEWCOMB, *supra* note 88, at 7, 57-58, 447-48; A. PERRY, *supra* note 89, at 70, 72, 125, 134-35; J. STURTEVANT, *supra* note 86, at 8; A. WALKER, *supra* note 86, at 77-81.

94. See, e.g., A. PERRY, *supra* note 89, at 62, 81, 135, 136. See also S. NEWCOMB, *supra* note 88, at 7, 447-48.

95. See, e.g., A. PERRY, *supra* note 89, at 125-26, 136.

96. See, e.g., *id.* at 130-36; J. STURTEVANT, *supra* note 86, at 38; F. WAYLAND, *supra* note 86, at 102-03, 271-72.

97. See, e.g., A. PERRY, *supra* note 89, at 136.

98. See, e.g., *id.* at 66, 136; F. WAYLAND, *supra* note 86, at 102.

99. See, e.g., A. PERRY, *supra* note 89, at 66, 136.

100. See, e.g., S. NEWCOMB, *supra* note 88, at 57-58; A. PERRY, *supra* note 89, at 66, 134, 136; F. WAYLAND, *supra* note 86, at 56.

101. See S. FINE, *supra* note 3, at 74.

102. See H. THORELLI, *supra* note 1, at 120.

103. F. WALKER, *POLITICAL ECONOMY* 263 (3d ed. 1888). See also, e.g., J. STURTEVANT, *supra* note 86, at 52-53; H. WOOD, *supra* note 87, at 36 ("The old adage that 'competition is the life of trade,' is well founded.").

104. See, e.g., F. BOWEN, *supra* note 88, at 33; A. PERRY, *supra* note 89, at 61-62. See also S. FINE, *supra* note 3, at 56.

105. See, e.g., A. PERRY, *supra* note 89, at 62, 64, 125, 129; F. WAYLAND, *supra* note 86, at 6-7, 181; H. WOOD, *supra* note 87, at 19, 61. See also Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U.L. REV. 939, 949 (1985) [hereinafter Kennedy, *Law in Economic Thought*].

106. See, e.g., F. BOWEN, *supra* note 88, at 216, 225, 229; F. WAYLAND, *supra* note 86, at 174.

competition, and force prices downward until supply and demand once again achieved an equilibrium generating fair, normal prices and returns.<sup>107</sup>

Economists differed somewhat in their descriptions of the prices and returns produced by this process. Yet, late nineteenth century American academic and popular exponents of classical economics widely shared the vision articulated, for example, by Wayland and Chapin:

Assuming that there is, as there ought to be, free competition in the processes of Exchange, as in the processes of Production, the perturbations of value caused by variations of demand and supply continue only during a period, which cannot exceed the length of time necessary for altering the supply. Under the pressure of competition, demand and supply always rush to an equilibrium; but the condition of stable equilibrium is when things exchange for each other according to *their cost of production*, or at what is fitly called their *natural value*.<sup>108</sup>

When economic writers analyzed production costs and market values in more detail, they focused preeminently on the contributions of labor.<sup>109</sup> Classical economists declared that the long run competitive equilibrium prices of all goods tended to

107. See, e.g., F. BOWEN, *supra* note 88, at 241:

[I]f the gains in one department of enterprise are notoriously above the average,—if it is even suspected by a multitude of sharp-sighted observers, who are on the lookout for such opportunities, that they exceed the average,—more capital is at once attracted into the employment, till, by the competition of the capitalists with each other, the rate of Profit is reduced to the common standard in other enterprises.

See also *id.* at 215–16, 225.

Nineteenth century writers varied somewhat in their focus when they talked about competition in economic life. Some writers used the term to refer partly or even primarily to vertical relationships, especially the relations between employers and employees. See, e.g., A. WALKER, *supra* note 86, at 21 (declaring that labor and capital are “competitors” and that the “competition of labor and capital never ceases; but it respects the bond of union in which only each has its own full development”). See also Hovenkamp, *Labor Conspiracies in American Law, 1880–1930*, 66 TEX. L. REV. 919, 936 (1988) [hereinafter Hovenkamp, *Labor Conspiracies*] (discussing such scholarly tendencies). Nineteenth century economic writers in general, however, concentrated heavily on horizontal rivalry when they spoke of competition. See, e.g., S. NEWCOMB, *supra* note 88, at 248, 250, 448 (“If the makers [of an article] charge too much for it, other makers will compete and thus lower the price.”); H. WOOD, *supra* note 87, at 36 (declaring that competition in the business world “consists either in giving a better article at the same price, or as good a one for less”). Indeed, at least one leading writer took pains to stress the horizontal rather than vertical character of competition, even in the context of relations between labor and capital. See J. STURTEVANT, *supra* note 86, at 158 (“It should also be borne in mind, that the competition which determines wages . . . is the competition of labor with labor, and not of labor with capital.”).

The strength of prevailing horizontal conceptions also was reflected, for example, in one of the leading late nineteenth century judicial articulations stressing the importance of vertical rivalry. In his famous 1896 dissent in *Vegelahn v. Guntner*, 167 Mass. 92, 104–09, 44 N.E. 1077, 1079–82 (1896) (Holmes, J., dissenting), Oliver Wendell Holmes explicitly acknowledged the longstanding policy in favor of horizontal business competition. See *id.* at 106–07, 44 N.E. at 1080–81 (Holmes, J., dissenting). He conceded, indeed, that some people believed that the nonhorizontal rivalry between employers and workers could not similarly be deemed “competition,” and precisely for this reason he suggested that such vertical rivalry might be referred to as the “free struggle for life” rather than “free competition.” See *id.* at 107, 44 N.E. at 1081 (Holmes, J., dissenting). On Holmes’ views on competition as a Justice of the United States Supreme Court, see *infra* note 411.

108. F. WAYLAND, *supra* note 86, at 269–70. The text went on to explain, more precisely, that this production cost measure of a good’s natural value referred specifically to “the cost value of the most costly portion of it which the market demands.” *Id.* at 269. Academic and popular writers widely accepted this theory of “natural” or “normal” values and prices. See, e.g., J. CLARK, *THE DISTRIBUTION OF WEALTH: A THEORY OF WAGES, INTEREST AND PROFITS* 16–17, 69–70, 77–79 (1899) (finding the theory basically sound, but incomplete and often violated by real world conditions deviating from perfect competition); H. WOOD, *supra* note 87, at 69. See also May, *supra* note 4, at 572–88 (describing the characteristics of natural value theory and its influence in formative era antitrust jurisprudence); Siegel, *supra* note 20, at 244–59 (discussing the power of natural value ideas in the theory and practice of late nineteenth and twentieth century United States Supreme Court rate regulation review, and the impact of the decline of these ideas). Not all classical economic writers approved of natural value theory, however. See, e.g., A. PERRY, *supra* note 89, at 263.

109. See, e.g., Kennedy, *Law in Economic Thought*, *supra* note 105, at 944–45; Siegel, *supra* note 20, at 244–45.

be proportional to the total amount of labor employed in their production<sup>110</sup> either directly, in the form of services, or indirectly, in the form of capital embodying prior services.<sup>111</sup> Accordingly, all individuals tended to receive for their own services or goods an equivalent, proportional return per relevant unit of contributed effort,<sup>112</sup> measured in terms not only of time but also of comparative productivity.<sup>113</sup> As a result, economic writers concluded, consumers,<sup>114</sup> owners of capital,<sup>115</sup> and providers of labor<sup>116</sup> all gained the benefit of prices and returns that not only were natural, but also just. As Francis Bowen, for example, explained in his major text, *The Principles of Political Economy Applied to the Condition, the Resources, and the Institutions of the American People*:<sup>117</sup>

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110. See, e.g., F. BOWEN, *supra* note 88, at 41, 46, 65 (noting the "law of distribution . . . that the value of the completed product will be divided among its producers in exact proportion to the labor bestowed by each"); *id.* at 238 (declaring "in the last analysis . . . the creation of all value can be traced to labor alone"); A. PERRY, *supra* note 89, at 106 (noting the "tendency in value to proportion itself to the aggregate of the onerous human efforts represented in a service"); A. WALKER, *supra* note 86, at 18; F. WAYLAND, *supra* note 86, at 14, 20. Scholarly explanations of the labor theory of value sometimes began with an acknowledged oversimplification. No party to an exchange, it was said, would sacrifice more hours of effort, in service for another or in production of an exchangeable commodity, than the number of hours of effort he or she received back directly in services or indirectly in goods embodying another party's labor. If one received less hours of labor effort in return, it would be better to avoid exchange and instead spend that lesser number of hours producing the desired services or goods oneself. See, e.g., F. BOWEN, *supra* note 88, at 46-47. In practice, however, such competitive self-help entry into new endeavors was not a viable alternative to "overpriced" exchange in each individual instance. Differences of established skill levels, for example, often precluded one party from recreating a service or good with as little labor as it took the other party to the exchange to produce it. See, e.g., *id.* at 47; Kennedy, *Law in Economic Thought*, *supra* note 105, at 944. Instead, marketwide proportionality of prices to labor inputs tended to be ensured in practice by the more general forces of competition already noted. Wherever returns to labor expenditure were disproportionately high, new competitors entered and forced the level of returns downward. Wherever labor received disproportionately low returns, competitors would start to exit, causing supply and competition to decline and returns to rise. In the end, competition would tend to equalize returns per unit of labor throughout the economy. See, e.g., F. BOWEN, *supra* note 88, at 47; Kennedy, *Law in Economic Thought*, *supra* note 105, at 944-45.

111. See, e.g., F. BOWEN, *supra* note 88, at 65, 238 ("Capital itself is created by labor, and may be called consolidated or invested labor. It consists of the economized or reserved fruits of *previous* labor, so that Profits are only the compensation of *former* industry, just as Wages are the compensation of *present* industry."); *id.* at 272; A. WALKER, *supra* note 86, at 19. Assimilation of the production contribution of land, the third classic factor of production, proved somewhat more problematic, yet economic writers worked hard to bring rents within the labor theory of value as well. See, e.g., F. BOWEN, *supra* note 88, at 238; Kennedy, *Law in Economic Thought*, *supra* note 105, at 948.

112. See, e.g., *infra* text accompanying note 118. See also Kennedy, *Law in Economic Thought*, *supra* note 105, at 945.

113. See, e.g., F. BOWEN, *supra* note 88, at 41 (explaining in connection with the labor theory of value that "[t]he only measure of such labor is its comparative efficiency"). In addition, economists noted that cash wage payments did not fully reflect the net return actually received by various laborers, because this was affected as well by such additional circumstances as educational requirements for the employment, the onerousness or pleasantness of the job, and the certainty or uncertainty of reward. See, e.g., *id.* at 216-23; J. STURTEVANT, *supra* note 86, at 180-84; A. WALKER, *supra* note 86, at 260-62.

114. See, e.g., F. BOWEN, *supra* note 88, at 57; H. WOOD, *supra* note 87, at 126 ("Without State interference, business policy and competition are each constantly forcing the rates for service towards the normal standard, or to such a point as is natural and fair.").

115. See, e.g., H. WOOD, *supra* note 87, at 69 ("There is a fair and normal value at which supply and demand meet, to the mutual advantage of producer and consumer.").

116. See, e.g., F. BOWEN, *supra* note 88, at 57 (noting, for example, that competition generates "a fair compensation" for retailers); A. PERRY, *supra* note 89, at 208 ("Workmen who are intelligent, prudent, skilful, will infallibly get their due."); F. WAYLAND, *supra* note 86, at 174 ("If competition were universally *free and fair* . . . [i]t would adjust the customary rate of wages at that golden mean which would ensure a comfortable support to laborers and adequate profits to employers."); H. WOOD, *supra* note 87, at 30, 93 ("The law of compensation is untiring in finding the specific gravity of every person, and in meting to him his desserts.").

117. F. BOWEN, *supra* note 88.

[C]ompetition is the general rule; and the effect of unrestrained competition is to distribute the value of a product equally among its various producers, leaving neither to any of them, nor to the consumer, any just ground of complaint. Each receives in exact proportion to the labor which he has bestowed; the labor of all was equally necessary to present the article in its finished state; and he who finally consumes it, therefore, justly pays all by rendering an equivalent amount of labor.<sup>118</sup>

Conditions of freedom, allowing full, unimpeded operation of natural economic law, thus generated both justice and harmony among individuals and groups in the economy.<sup>119</sup> Rejecting the pessimism of much of British classical economic theory,<sup>120</sup> American writers stressed not only a harmony of producer and consumer interests achieved through natural, fair prices, but also a fundamental harmony of interest between labor and capital, notwithstanding increasing contemporary indications of apparent conflict. Labor and capital each needed the other in order to create new commodities<sup>121</sup> and, economic writers noted, "high wages and high profits often go together, and tend to produce each other."<sup>122</sup> Wage increases boosted labor productivity and therefore generated greater profits.<sup>123</sup> At the same time, greater profits led to the payment of higher wages.<sup>124</sup> As Arthur Perry explained: "When the matter is sifted to the bottom, it is seen that capital is as much interested in the prosperity of labor, as labor is interested in the prosperity of capital. All legitimate interests are in harmony."<sup>125</sup>

Realization of this harmonious, just world of natural, free, competitive production and exchange critically depended on the security of economic liberty and property, and the protection and availability of bargaining activity. Individuals would not most vigorously and fully take advantage of efficient specialization with an eye toward later competitive exchange unless they could freely choose their own callings,<sup>126</sup> felt safe from external expropriation of the products of their own labor,<sup>127</sup>

118. *Id.* at 52. See also, e.g., A. WALKER, *supra* note 86, at 282.

119. As the popular writer Henry Wood proclaimed: "Viewed in itself . . . the present economic order, with all its inherent laws, is beneficent. Commerce, *per se*, is altruistic." H. WOOD, *supra* note 87, at 43. See also, e.g., S. NEWCOMB, *supra* note 88, at 5 (declaring that economic processes are those of "a single harmonious system").

120. See, e.g., Hovenkamp, *Political Economy*, *supra* note 20, at 404-31.

121. See, e.g., F. BOWEN, *supra* note 88, at 272.

122. *Id.* at 240. See also A. PERRY, *supra* note 89, at 227.

123. See, e.g., A. PERRY, *supra* note 89, at 227 ("If . . . as they undoubtedly do, high wages tend to make the workmen more intelligent, industrious, frugal, and inventive, they are not a loss to the capitalist, but a gain. Larger gross returns are thereby secured.").

124. See, e.g., F. BOWEN, *supra* note 88, at 240 ("When a capitalist is making large profits, he is eager to extent [sic] his business, to employ more hands, and consequently he offers higher wages."); A. PERRY, *supra* note 89, at 227; J. STURTEVANT, *supra* note 86, at 173.

125. A. PERRY, *supra* note 89, at 228. Or, as Wayland and Chapin put it, labor and capital "are natural partners, and if not interfered with, will spontaneously seek each other as birds mate in the spring for a happy, fruitful union." F. WAYLAND, *supra* note 86, at 107. Amasa Walker even more strongly attacked the belief

that hatred and retaliation are the normal relations of capital and labor, and that mutual distrust and hurtfulness are inevitable in all the developments of industry. Such a belief blasphemes against the harmonies of Providence,—is sightless before the glorious order of man and nature. It was the popular faith in such a principle of hurt, not help, between the two great divisions of industrial power, that effected the Revolution in France.

A. WALKER, *supra* note 86, at 22.

126. See, e.g., A. PERRY, *supra* note 89, at 134; F. WAYLAND, *supra* note 86, at 102, 271.

127. See, e.g., F. BOWEN, *supra* note 88, at 76, 78, 127; F. WAYLAND, *supra* note 86, at 99 (declaring that when private property is threatened "production languishes, industry diminishes, and the richest soil fails to support its few and impoverished inhabitants").

and fully expected the opportunities for genuinely free exchange to remain open.<sup>128</sup> Artificial interference with these natural rights and laws of labor, property, and exchange necessarily would diminish the just results that these laws otherwise would generate for both individuals and society at large.<sup>129</sup>

### 3. *Security, Freedom, and State Power in Political Liberalism and Classical Economics*

Security from interference with natural right formed an essential complement to the theme of freedom in both American political liberalism<sup>130</sup> and classical economics. Neither tradition embraced the harsher, and considerably less influential,<sup>131</sup> visions of late nineteenth century Social Darwinism. These more dominant traditions did not envision a world of ceaseless social warfare or boundless individualist rivalry, but instead posited a moral world of maximum freedom for individual activities not hurtful to others.<sup>132</sup> The state was necessary precisely because unrestrained individual pursuit of self-interest posed a potential threat to the life, liberty, property, and happiness of other individuals.<sup>133</sup> The state's legitimate and essential role was to identify and deter forms of the pursuit of self-interest that exceeded the scope of individual natural freedom and that threatened the legitimate interests and basic rights of other individuals.<sup>134</sup>

Late nineteenth century political and economic discussions of security and freedom paralleled and supported each other. Economic principles frequently colored political perspectives.<sup>135</sup> At the same time, economic writers proclaimed that the

128. See, e.g., F. WAYLAND, *supra* note 86, at 272.

129. See, e.g., A. PERRY, *supra* note 89, at 134–36. See also Kennedy, *Law in Economic Thought*, *supra* note 105, at 947.

130. See, e.g., R. UNGER, *supra* note 83; Singer, *supra* note 83, at 980–84.

131. See, e.g., R. BANNISTER, SOCIAL DARWINISM: SCIENCE AND MYTH IN ANGLO-AMERICAN SOCIAL THOUGHT 3–13 (1979); Benedict, *supra* note 20, at 21; Hovenkamp, *Political Economy*, *supra* note 20, at 417–20.

132. See, e.g., *supra* text accompanying notes 112–25; Hovenkamp, *Political Economy*, *supra* note 20, at 417–20 (on economic thought); Singer, *supra* note 83, at 980 (on liberalism). This basic vision found expression in law, for example, in the fundamental maxim *sic utere tuo ut alienum non laedas* ("so use your own as not to injure another"). See, e.g., C. JACOBS, *supra* note 20, at 60–61 (describing the emphasis that the treatise writer Christopher G. Tiedeman placed on this maxim). See also *infra* text accompanying note 636.

133. See, e.g., R. UNGER, *supra* note 83, at 67, 69, 71–72; Singer, *supra* note 83, at 980.

134. See, e.g., Singer, *supra* note 83, at 980–82. As Wayland and Chapin's text emphasized:

[A]s all men are not influenced in their conduct by moral and religious principles, it is necessary that aggression be somehow prevented, and violations of property, in so far as possible, redressed. Hence the importance of *wholesome and equitable laws*, of an independent and firm judiciary, and an executive, which shall carry the decisions of law faithfully into effect.

F. WAYLAND, *supra* note 86, at 100. See also, e.g., F. BOWEN, *supra* note 88, at 78–79; S. NEWCOMB, *supra* note 88, at 449.

135. See *supra* note 85 and accompanying text. Justice Field's juxtaposition of the Declaration of Independence and Adam Smith's *Wealth of Nations* in his *Butchers' Union* concurrence, see *supra* text accompanying notes 35–38, was a striking expression of a much more pervasive tendency. The Missouri Constitution of 1875, for example, made the interrelation of economic and political visions of freedom and security even more explicit in its own bill of rights when it paraphrased the words of the Declaration of Independence to proclaim

[t]hat all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails of its chief design.

Mo. CONST. of 1875, art. II, § 4.

principles they posited were an aspect of the broader totality of basic American political rights. As Arthur Perry explained in his widely read book<sup>136</sup> *Elements of Political Economy*:<sup>137</sup>

The great struggles of mankind in all history past have been around three points as centres: first, freedom of person; second, freedom of opinion; third, freedom of exchange. In consequence of the struggle around the first point, personal slavery has now mainly disappeared from the earth; in consequence of the struggle around the second point, the freedom of opinion, and especially of religious opinion, has gained great victories in all lands, although much remains to be done before its complete triumph is assured; while, in consequence of the struggle around the third point, one barrier after another has been thrown down, one monopoly after another has been conquered, until it is pretty generally acknowledged at present that freedom of exchange is just as sacred as freedom of person and of opinion, and the struggle will certainly never cease until the liberty of contract and delivery, subject only to conditions of morals, health, and revenue shall be international and universal.<sup>138</sup>

Security of the natural rights of labor, property, and exchange required state enforcement of the legal rights of liberty, property, and contract.<sup>139</sup> Property was insecure unless protected from theft,<sup>140</sup> for example, and the freedom and frequency of exchange could not be ensured without controls on private duress and fraud<sup>141</sup> and redress for breaches of bargains once made.<sup>142</sup> Late nineteenth century classical economic writers pointed prominently to particular additional threats to labor, property, and exchange that they believed needed special attention as well. “Guild-like” trade union restrictions on free entry into particular trades assertedly threatened grievous harm to individual liberty of calling.<sup>143</sup> Both property and free, just exchange were threatened by anticompetitive combinations designed to raise wages<sup>144</sup> or prices<sup>145</sup> artificially, even though such efforts were believed typically to fail in the long run in the face of the natural forces of competition.<sup>146</sup> Normal competition itself could not be deemed inconsistent with the natural property rights of individuals, however, even if it lessened some individuals’ wages or profits, because full and free competition tended to guarantee a just equivalency of return in all exchanges and therefore protected the right that each individual naturally had in his or her own labor and productions.<sup>147</sup>

136. See, e.g., Hovenkamp, *Political Economy*, *supra* note 20, at 433 n.269.

137. A. PERRY, *supra* note 89.

138. *Id.* at 143.

139. See, e.g., *id.* at 66–67; Kennedy, *Law in Economic Thought*, *supra* note 105, at 949.

140. See, e.g., F. BOWEN, *supra* note 88, at 23, 30, 79; F. WAYLAND, *supra* note 86, at 99.

141. See, e.g., F. WAYLAND, *supra* note 86, at 99, 174.

142. See, e.g., *id.* at 99.

143. See, e.g., F. BOWEN, *supra* note 88, at 228–29; J. STURTEVANT, *supra* note 86, at 163–64; A. WALKER, *supra* note 86, at 271–72; F. WAYLAND, *supra* note 86, at 105, 177.

144. See, e.g., F. WAYLAND, *supra* note 86, at 110, 177; H. WOOD, *supra* note 87, at 30, 40, 84–85.

145. See, e.g., F. WAYLAND, *supra* note 86, at 179–80; H. WOOD, *supra* note 87, at 28, 40, 61–63.

146. See, e.g., A. WALKER, *supra* note 86, at 273, 283; F. WAYLAND, *supra* note 86, at 179–80; H. WOOD, *supra* note 87, at 29, 40, 63–64, 66–67, 71–72, 85.

147. See *supra* text accompany notes 110–18. Individuals had no property right to any greater return than this normal return that they would tend to receive under conditions of full and free competition. This core understanding of competitive exchange value as a measure of property right was crucial not only in classical economic thought, but also in Progressive Era United States Supreme Court due process review of rate regulation. On this point, see Professor



As long as legislatures, executives, and courts acted simply to enforce and protect natural rights, state action would remain the essential facilitator of natural law and not its enemy.<sup>148</sup> Removal of such "stumbling blocks" as vice and crime, for example, did not create but prevented "interference with the natural order of things."<sup>149</sup> "Legislation directed to this end," Francis Bowen declared, "is only a legitimate carrying out of the *laissez-faire* principle."<sup>150</sup> Arthur Perry summed up well this vision of the inherent nature of rights and the fundamental need for neutral state action to protect them when he proclaimed simply: "rights are objective realities that can be enforced in the courts."<sup>151</sup>

If, however, the state departed from neutral support of natural rights it, too, could become a dangerous source of oppression and economic decline.<sup>152</sup> Identification of the appropriate limits of government power constituted the critical recurring question of late nineteenth and early twentieth century constitutional adjudication. In repeatedly affirming and applying the core constitutional principles of economic liberty, substantive due process, and liberty of contract,<sup>153</sup> Progressive Era judges sought to ensure that state action supported rather than threatened the corresponding natural rights of labor, property, and exchange that were fundamental to liberal political theory and classical economic thought alike.

#### 4. *Laissez-Faire Constitutionalism and Political, Moral, and Economic Theory*

Judicial application of these core principles of laissez-faire constitutionalism in general, and judicial apprehension of the dangers of unequal class legislation and paternalism in particular, repeatedly reflected a powerful intermixture of interconnected political, moral, and economic ideas. Antipathy to unequal class or special legislation<sup>154</sup> reflected a long-standing political libertarian concern<sup>155</sup> strongly shared by American classical economic writers.<sup>156</sup> The heirs of Jacksonian liberalism<sup>157</sup> and the American proponents of classical economics deemed such governmental favoritism and discrimination to be at once politically oppressive, ethically repugnant, and

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Stephen A. Siegel's very helpful discussion in Siegel, *supra* note 20, at 231–32, 244–63. As time went on, the theoretical grounds for tolerating the private losses from competition did receive somewhat greater scrutiny in jurisprudential philosophy, however. See, e.g., Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894); Singer, *supra* note 83, at 1011–13, 1031–34. On late nineteenth and early twentieth century distinctions between "normal" and "abnormal" competition, see *infra* note 251 and accompanying text.

148. See, e.g., Kennedy, *Law in Economic Thought*, *supra* note 105, at 949–50.

149. F. BOWEN, *supra* note 88, at 23–24.

150. *Id.* at 24.

151. A. PERRY, *supra* note 89, at 110.

152. On such concerns within liberalism, see, for example, R. UNGER, *supra* note 83, at 70–75; Singer, *supra* note 83, at 980–82. On this concern in American classical economic thought, see, for example, F. BOWEN, *supra* note 88, at 78; A. PERRY, *supra* note 89, at 135; F. WAYLAND, *supra* note 86, at 100–02.

153. See *supra* text accompanying notes 20–78.

154. See *supra* note 51 and accompanying text.

155. See Benedict, *supra* note 20.

156. See, e.g., F. BOWEN, *supra* note 88, at 225–28; A. PERRY, *supra* note 89, at 210–12; F. WAYLAND, *supra* note 86, at 102–07, 111.

157. It was this specific variant of the American liberal political tradition that proved to be particularly influential in laissez-faire constitutionalism. See, e.g., Benedict, *supra* note 20.

economically pernicious, regardless of who it benefited;<sup>158</sup> and they warned of both special interest domination<sup>159</sup> and redistributive leveling by popular majorities.<sup>160</sup> Political and economic writers declared unequal class or special legislation politically intolerable because it perverted the state's proper role as neutral umpire protecting the equal rights of all.<sup>161</sup> They declared it immoral because artificial, redistributive assistance to some at the expense of others amounted ethically to theft,<sup>162</sup> and they declared it abhorrent economically because deviation from neutral support of basic rights necessarily impaired the optimal, just outcomes of natural economic law.<sup>163</sup> In addition, enactment of unequal special legislation favoring some groups or persons assertedly spurred other groups to demand comparable legislative benefits.<sup>164</sup> Ultimately, the process would lead to corruption<sup>165</sup> and a battle for control of the state itself.<sup>166</sup> In the end, the most powerful groups would triumph and displace liberal republican government with plutocratic tyranny.<sup>167</sup>

Economic and political theorists prominently highlighted grants of monopoly business privileges<sup>168</sup> and protective wage and hour legislation<sup>169</sup> among the various types of regulation and promotion they condemned as unequal "class" legislation.<sup>170</sup> In their discussions of such measures, economic writers pointed to important, additional harms beyond the general political, moral, and economic dangers already noted. Economists emphasized, for example, that establishment of artificial monopolies impaired economic liberty,<sup>171</sup> thereby reducing productive investment in the affected trade<sup>172</sup> while it simultaneously reduced output<sup>173</sup> and

158. See, e.g., A. PERRY, *supra* note 89, at 211; F. WAYLAND, *supra* note 86, at 111; Benedict, *supra* note 20, at 306-13, 319; Jones, *supra* note 20, at 755-56.

159. See, e.g., Benedict, *supra* note 20, at 311-12, 314-19; Jones, *supra* note 20, at 755-56.

160. See, e.g., Horwitz, *Republicanism and Liberalism*, *supra* note 32, at 60.

161. See, e.g., Benedict, *supra* note 20, at 305, 311-12, 319; Jones, *supra* note 20, at 756.

162. See, e.g., F. WAYLAND, *supra* note 86, at 105; Benedict, *supra* note 20, at 305; Kennedy, *Law in Economic Thought*, *supra* note 105, at 947.

163. See *supra* note 129 and accompanying text.

164. See, e.g., *State v. Loomis*, 115 Mo. 307, 317-18, 22 S.W. 350, 352 (1893) (stressing that if courts did not declare unequal "class" legislation unconstitutional, "it is difficult to see an end to such legislation, and the government becomes one of special privileges, instead of a compact 'to promote the general welfare of the people'"); *id.* at 316, 22 S.W. at 352; A. PERRY, *supra* note 89, at 210-11; F. WAYLAND, *supra* note 86, at 110-11; Benedict, *supra* note 20, at 312-13.

165. See, e.g., Benedict, *supra* note 20, at 311.

166. See, e.g., *People ex rel. Annan v. Walsh*, 22 N.E. 682, 694 (1889) (Peckham, J., dissenting), unreported opinion subsequently published in connection with the case of *People v. Budd*, 117 N.Y. 1, 68 (1889) (Peckham, J., dissenting) (declaring that to uphold rate regulation of the sort involved in this case "is to provide the most frequent opportunity for arraying class against class; and, in addition to the ordinary competition that exists through all industries, a new competition will be introduced, that of competition for the possession of the government").

167. See Thomas Cooley's famous warning in *People v. Salem*, 20 Mich. 452, 487 (1870), that "when the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger." See also, e.g., W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* 66 (1965); Benedict, *supra* note 20, at 311-12.

168. See, e.g., A. PERRY, *supra* note 89, at 138-39; A. WALKER, *supra* note 86, at 255; F. WAYLAND, *supra* note 86, at 104-05; Benedict, *supra* note 20, at 314-21, 328.

169. See, e.g., A. PERRY, *supra* note 89, at 211; F. WAYLAND, *supra* note 86, at 111.

170. See, e.g., Benedict, *supra* note 20, at 305-26 (surveying the various types of government promotion and regulation attacked as unequal "class" or "special" legislation).

171. See, e.g., F. WAYLAND, *supra* note 86, at 102-04.

172. See *id.* at 104.

173. See, e.g., *id.* at 14.

innovation,<sup>174</sup> impaired free exchange,<sup>175</sup> and increased prices.<sup>176</sup> As a result, the consumer not only suffered a loss in wealth, but in addition became subject to "the mere will of his oppressor."<sup>177</sup>

Similarly, legislative limitation of wage and hour terms potentially harmed not only employers but also employees themselves. As previously noted, American classical economists believed that, ideally, where there was free mobility of labor, the interests of capital and labor were in harmony and competition would guarantee both workers and employers a just return.<sup>178</sup> Although they granted that real world conditions often varied from this theoretical ideal,<sup>179</sup> classical thinkers nevertheless believed that wage and hour regulation likely would do more harm than good. Most fundamentally, they believed that government lacked sufficient wisdom to determine appropriate bargaining terms.<sup>180</sup> In addition, classical theorists reasoned that deviations from natural law potentially harmed at least some workers because it lessened the exchange options of workers who might have found legislatively barred terms to be advantageous.<sup>181</sup> Moreover, those classical economists who still subscribed to the "wage-fund" theory<sup>182</sup> concluded that any artificial increase in wages for some workers necessarily meant reduced wages for some other laborers<sup>183</sup> or, ultimately, for all workers in general<sup>184</sup> because a limited "wage fund" would remain constant or would shrink as increased wages reduced capital investment and long-term productivity and earnings.<sup>185</sup>

Finally, even if workers gained advantages in better wages or hours, special legislation threatened individual workers and society at large with harm from the corrosive effects of paternalism. Progressive Era jurists, particularly in the state courts, repeatedly condemned paternalism<sup>186</sup> as an especially severe threat to the essential self-reliant, independent individualism underlying Protestant morality,<sup>187</sup> liberal politics,<sup>188</sup> and classical economics.<sup>189</sup> The strongest statements came in state court opinions in the 1880s and 1890s.<sup>190</sup> In a classic early instance, the Pennsylvania

174. See, e.g., A. PERRY, *supra* note 89, at 139.

175. See, e.g., *id.* at 138.

176. See, e.g., *id.*; F. WAYLAND, *supra* note 86, at 14, 104-05.

177. F. WAYLAND, *supra* note 86, at 105.

178. See *supra* text accompanying notes 112-25.

179. See, e.g., F. WAYLAND, *supra* note 86, at 174.

180. See, e.g., A. PERRY, *supra* note 89, at 211 ("Legislatures are not wise enough . . . to say, for example, how much wages capitalists should pay, or how many hours per day adult laborers shall work. To attempt to regulate any such things as these by legislation is an economic abomination.").

181. See, e.g., Benedict, *supra* note 20, at 308.

182. On the wage-fund theory in general and the intense disagreements among American economists on this issue, see Hovenkamp, *Political Economy*, *supra* note 20, at 431-37.

183. See Benedict, *supra* note 20, at 308.

184. See Hovenkamp, *Political Economy*, *supra* note 20, at 433, 437.

185. See *id.*

186. See *supra* note 53 and accompanying text.

187. See, e.g., S. FINE, *supra* note 3, at 5, 118-25; H. THORELLI, *supra* note 1, at 566; Hovenkamp, *Political Economy*, *supra* note 20, at 412-17, 419.

188. See, e.g., S. FINE, *supra* note 3, at 5.

189. See, e.g., *id.* at 47-73.

190. See, e.g., *State ex rel. Garth v. Switzler*, 143 Mo. 287, 322-23, 45 S.W. 245, 251 (1898); *State v. Loomis*,

Supreme Court, for example, condemned a "scrip" statute that required wages to be paid in lawful money, declaring it to be "an insulting attempt to put the laborer under legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States."<sup>191</sup> The severity of the threat that paternalism posed to both free political institutions and American prosperity was perhaps best expressed by Chief Justice John B. Gantt of the Missouri Supreme Court. Condemning a tax-supported scholarship fund as illegitimate government favoritism toward the state university students who would benefit from it,<sup>192</sup> Chief Justice Gantt explained:

Paternalism, whether State or Federal, as the derivation of the term implies, is an assumption by the government of a quasi-fatherly relation to the citizen and his family, involving excessive governmental regulation of the private affairs and business methods and interests of the people, upon the theory that the people are incapable of managing their own affairs, and is pernicious in its tendencies. In a word it minimizes the citizen and maximizes the government. Our Federal and State governments are founded upon a principle wholly antagonistic to such a doctrine. Our fathers believed the people of these free and independent states were capable of self-government; a system in which the people are the sovereigns and the government their creature to carry out their commands. Such a government is founded on the willingness and the right of the people to take care of their own affairs and an indisposition on their part to look to the government for everything. The citizen is the unit. It is his province to support the government, and not the government's to support him. Under self-government we have advanced in all the elements of a great people more rapidly than any nation that has ever existed upon the earth, and there is greater need now than ever before in our history of adhering to it. Paternalism is a plant that should receive no nourishment upon the soil of Missouri.<sup>193</sup>

Traditional fears of the political, moral, and economic consequences of excessive government activism ultimately prompted those judges most heavily influenced by these fears to suggest, at least rhetorically, the continued relevance of the old "political maxim that the government governs best that governs least";<sup>194</sup> for as the New York Court of Appeals, for example, declared in its 1885 opinion in *In re Jacobs*,<sup>195</sup> improper government interferences in economic affairs "disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry and cause a score of ills while attempting the removal of one."<sup>196</sup>

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115 Mo. 307, 319-20, 22 S.W. 350, 353 (1893); *Godcharles v. Wigeman*, 113 Pa. 431, 437, 6 A. 354, 355-56 (1886); *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188, 10 S.E. 288 (1889).

191. *Godcharles v. Wigeman*, 113 Pa. 431, 437, 6 A. 354, 355-56 (1886). Striking down a similar law three years later, the Court of Appeals of West Virginia also warned of paternalism even while reiterating the essentiality of the state and its relation to natural law:

No one questions the position that, unless the government intervened to protect property and regulate trade, property would cease to exist, and trade would exist only as an engine of fraud; but this does not authorize the government to do for its people what they can do for themselves. The natural law of supply and demand is the best law of trade.

*State v. Goodwill*, 33 W. Va. 179, 184, 10 S.E. 285, 287 (1889).

192. See *State ex rel. Garth v. Switzler*, 143 Mo. 287, 320-26, 45 S.W. 245, 250-52 (1898).

193. *Id.* at 322-23, 45 S.W. at 251.

194. *People ex rel. Rodgers v. Coler*, 166 N.Y. 1, 14, 59 N.E. 716, 726 (1901).

195. 98 N.Y. 98 (1885).

196. *Id.* at 115. Classical economic writers repeatedly reiterated such warnings. See, e.g., F. BOWEN, *supra* note 88, at 22-23; A. PERRY, *supra* note 89, at 67, 135-37.

Even if the problems posed by a particular instance of government impropriety were not severe, failure firmly to enforce the constitutional principles identifying the limits of legitimate government activity would open the door to much more extensive, and collectively more dangerous, impropriety. As the New York Court of Appeals noted in its decision in *In re Jacobs*:

Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the Constitution, while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions.<sup>197</sup>

### C. *Traditional Theory and New Realities in Progressive Era America*

The sentiments expressed in contemporary constitutional jurisprudence affirmed a powerful political and economic orientation that remained widely influential in late nineteenth and early twentieth century American thinking. At a time of dramatic political and economic change, this traditional vision of a natural, rights-based order strongly tending to maximize opportunity, prosperity, justice, harmony, and freedom provided a basic frame of reference for a great many observers as they sought to understand and respond to the ongoing processes of national transformation.<sup>198</sup>

This is not to suggest that late nineteenth and early twentieth century thinking displayed only little variation. That most certainly was not the case.<sup>199</sup> Some Americans embraced these traditional perspectives much more readily, completely, and steadfastly than did others. Indeed, the substantiality of contemporary change led many observers to reject particular traditional views in favor of new, alternative visions, especially bureaucratic and technocratic ones, as time went on.<sup>200</sup> Moreover, considerable intellectual diversity prevailed even among the large number of Americans who still adhered to the core ideas of political liberalism and classical economics, for these observers frequently disagreed on the proper application of general theory and often invoked these ideas in substantially differing and sometimes contradictory ways.<sup>201</sup> For example, while many Americans repeatedly attacked

197. *Jacobs*, 98 N.Y. at 114–15.

198. On the continuing power of such traditional perspectives during this period, see R. HOFSTADTER, *Antitrust Movement*, *supra* note 85, at 196; M. SKLAR, *supra* note 1, at 54, 77–78, 85; Keller, *The Pluralist State: American Economic Regulation in Comparative Perspective, 1900–1930*, in *REGULATION IN PERSPECTIVE* 56, 65, 68, 69 (T. McCraw ed. 1981).

199. On the diversity of American ideological and practical responses to late nineteenth and early twentieth century economic change, see R. BANNISTER, *supra* note 131; P. BOLLER, *supra* note 88; J. DORFMAN, *supra* note 86; S. FINE, *supra* note 3, at 29–400; R. HOFSTADTER, *SOCIAL DARWINISM*, *supra* note 91; W. LETWIN, *supra* note 167, at 53–77, 81–85; E. PURCELL, *supra* note 66; H. THORELLI, *supra* note 1, at 108–63, 309–68; M. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1976); R. WIEBE, *THE SEARCH FOR ORDER 1877–1920*, at 133–63 (1967); May, *supra* note 4, at 561–71.

200. See, e.g., R. WIEBE, *supra* note 199, at 145–63.

201. See, e.g., May, *supra* note 4, at 568–71 (describing the similar invocation of natural law or natural process ideas in otherwise differing Progressive Era analyses of the origins of the “trusts”).

major new political<sup>202</sup> or economic<sup>203</sup> developments as an alarming perversion of traditional principles, many contemporary observers asserted that the prominent new patterns of political and economic life could be harmonized with traditional precepts.<sup>204</sup> In addition, observers sharing the same general theoretical orientation sometimes produced differing statements of essential theory not because of fundamental analytical disagreement, but simply because particular factual circumstances created pressure to stress certain theoretical elements more heavily than others.<sup>205</sup> Finally, individual Americans frequently added still further to contemporary analytical variety by embracing various older and newer perspectives at the same time, sometimes at the cost of thoroughgoing logical consistency.<sup>206</sup>

As already noted, in the midst of such diversity, late nineteenth and early twentieth century judges tended to adopt a comparatively "conservative" stance and strongly reaffirmed familiar political and economic perspectives in response to rapidly changing circumstances.<sup>207</sup> Repeatedly, contemporary judges invoked Jacksonian liberal political ideals emphasizing limited state involvement in economic matters and the dangers of unequal "class" legislation,<sup>208</sup> even while legislators and chief executives enacted and implemented new forms of regulation and protective legislation on an increasing scale.<sup>209</sup> Similarly, Progressive Era judges frequently reaffirmed basic classical economic principles premised on a world of small-scale proprietary capitalism and emphasizing entrepreneurial opportunity, free exchange,

202. See, e.g., S. FINE, *supra* note 3, at 29–164 (describing such contemporary criticisms of late nineteenth century legislation).

203. The antitrust philosophy of Louis Brandeis, for example, provides a striking illustration of such a stance. Brandeis repeatedly reaffirmed a traditional small-scale capitalist vision despite the increasing concentration of American industry, declaring "bigness" to be the result of interference with the natural, beneficent processes of economic life. He explained:

It will be found that wherever competition has been suppressed it has been due either to resort to ruthless processes, or by improper use of inordinate wealth and power. The attempt to dismember existing illegal trusts is not, therefore, an attempt to interfere in any way with the natural law of business. It is an endeavor to restore health by removing a cancer from the body industrial. It is not an attempt to create competition artificially, but it is the removing of the obstacle to competition.

. . . .

Diagnosis shows monopoly to be an artificial, not a natural, product. Competition, therefore, may be preserved by preventing that course of conduct by which in the past monopolies have been established.

L. BRANDEIS, *Competition*, in THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 115–16, 123–24 (O. Fraenkel ed. 1934) [hereinafter L. BRANDEIS, *Competition*].

204. See, e.g., *supra* text accompanying notes 77–78 (describing state and federal jurists' increasing acceptance of Progressive Era legislative innovation despite their continued adherence to the traditional general principles embraced in laissez-faire constitutionalism). See also M. SKLAR, *supra* note 1, at 33–40 (describing Progressive Era efforts to meld "corporate capitalism and the American liberal tradition"); *id.* at 34.

205. For example, persons heavily influenced by the traditional perspectives of political liberalism and classical economics sometimes emphasized the importance of individual freedom of action especially strongly when the overall political and economic order posited by traditional theory did not seem seriously imperiled by such an emphasis. See, e.g., *infra* text accompanying notes 487–513, 542–608. At other times, when private collusive or predatory activity appeared to loom as a more serious danger to the labor, property, or exchange rights of others or seemed to threaten more seriously the natural processes of competition, judges and other observers stressed more heavily the limits on individual freedom of action, the rights of others, and the integrity and vitality of competition itself. See, e.g., *infra* text accompanying notes 667–68, 690–709.

206. See, e.g., R. WIEBE, *supra* note 199, at 152–53.

207. See *supra* text accompanying notes 79–85, 152–97.

208. See *supra* text accompanying notes 50–53, 154–97.

209. See, e.g., L. FRIEDMAN, *supra* note 3, at 439–63.

and vigorous competition,<sup>210</sup> even while concentrated corporate capitalism grew increasingly dominant,<sup>211</sup> anticompetitive combinations proliferated,<sup>212</sup> and professional economists themselves turned away from classical economic theory in substantial numbers.<sup>213</sup>

For some jurists, continued adherence to traditional principles was premised on a hope that the forces of political or economic change might be reversed, or at least slowed.<sup>214</sup> Other judges more readily accepted the inevitability, or even the desirability, of changed political and economic circumstances but believed that these basic principles still remained operative and essential even in a radically transformed national environment.<sup>215</sup>

#### *D. The Economic and Intellectual Origins of Early Antitrust Law*

Judges and other Americans greatly concerned with the maintenance of economic liberty, the security of property, and the integrity of the natural processes of competitive, free exchange in the face of the potential threats posed by governmental innovation cared no less about these same basic principles and values when the perceived threats arose from private activity. As noted already, traditionally-minded observers firmly believed that private as well as governmental impropriety imperiled basic rights and endangered the normal, beneficent operation of natural economic laws.<sup>216</sup> During the Populist and Progressive Eras, Americans widely perceived massive impropriety in contemporary private economic innovation and feared that this activity was severely threatening basic rights and the natural economic order.

In the post-Civil War decades, an expanded national transportation<sup>217</sup> and communications<sup>218</sup> network facilitated the geographic extension<sup>219</sup> of markets and allowed firms in many industries to increasingly take advantage of the greater economies of scale<sup>220</sup> made possible by the numerous technological breakthroughs<sup>221</sup> of the nineteenth and early twentieth centuries. While these developments generated substantial new advantages and opportunities, they simultaneously posed severe difficulties as well. New production technologies and expanded operations often demanded heavy fixed investments<sup>222</sup> and created a situation of periodic, severe

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210. See *supra* text accompanying notes 33–49, 79–197.

211. See, e.g., M. SKLAR, *supra* note 1, at 43–47.

212. See, e.g., H. THORELLI, *supra* note 1, at 63–96, 254–308.

213. See, e.g., P. BOLLER, *supra* note 88, at 84–93; J. DORFMAN, *supra* note 86, at 160–212; S. FINE, *supra* note 3, at 198–251; H. THORELLI, *supra* note 1, at 118–22. A number of leading economists who left classical theory for the “new” or “historical” school approaches of the 1880s, however, largely returned to core principles of classicism, albeit with important additions, in the “neoclassicism” of the 1890s and later years. See *infra* text accompanying notes 265–66.

214. See *supra* text accompanying notes 194–97.

215. See *supra* text accompanying notes 71–78.

216. See *supra* text accompanying notes 132–34, 139–51.

217. See, e.g., H. THORELLI, *supra* note 1, at 64.

218. See, e.g., *id.*

219. See *id.*

220. See, e.g., T. McCRAW, *supra* note 5, at 73; H. THORELLI, *supra* note 1, at 64.

221. See T. McCRAW, *supra* note 5, at 65; H. THORELLI, *supra* note 1, at 63–64.

222. See T. McCRAW, *supra* note 5, at 66; H. THORELLI, *supra* note 1, at 66.

“overcapacity” or “overproduction” in many lines of commerce.<sup>223</sup> As a result, competitive rivalry in various forms intensified<sup>224</sup> and threatened the viability of many firms,<sup>225</sup> as businesses with fixed investments not easily transferred to other uses struggled to maintain market share and recover at least something beyond their variable expenses.<sup>226</sup> In the face of such threats of “overproduction” and “cutthroat competition,” American firms in great numbers sought protection through various forms of mutual cooperation,<sup>227</sup> ranging from such “loose” combinations as simple cartels or pools,<sup>228</sup> to such tighter combinations as trusts, holding companies, and mergers,<sup>229</sup> which simultaneously offered possibilities of new productive efficiencies not achievable through simple “loose” arrangements.<sup>230</sup>

Americans witnessing these developments widely agreed that the new economic patterns raised fundamental questions about the future of American political and economic life.<sup>231</sup> Such questions lay at the heart of early antitrust discourse, which focused fundamentally on the extent to which basic, traditional principles and realities would be maintained, adapted, modified, or displaced in the face of the powerful contemporary currents of private economic innovation. These foundational issues remained central in American public affairs for a quarter of a century,<sup>232</sup> becoming a major focus not only of legislative<sup>233</sup> and judicial<sup>234</sup> activity, but also of state<sup>235</sup> and national electioneering, most prominently in the three-way presidential contest between Theodore Roosevelt, William Howard Taft, and Woodrow Wilson in 1912.<sup>236</sup>

Contemporary observers disagreed on major issues of antitrust policy in large measure because they disagreed on the naturalness, inevitability, and legitimacy of particular new patterns of economic activity. A great many Americans perceived important efficiencies in new large-scale corporate operations and accordingly approved of much or all of the contemporary increase in economic concentration.<sup>237</sup> Such approval often reflected a theoretical adaptation rather than any wholesale

223. See T. McCRAW, *supra* note 5, at 65–68; M. SKLAR, *supra* note 1, at 54.

224. See H. THORELLI, *supra* note 1, at 67–68 (discussing diverse forms of intensified competition including not only price cutting but also, for example, bribery and the dissemination of false rumors about competitors).

225. See *id.* at 67.

226. See T. McCRAW, *supra* note 5, at 66–67; H. THORELLI, *supra* note 1, at 67.

227. See T. McCRAW, *supra* note 5, at 66, 72; H. THORELLI, *supra* note 1, at 68, 72–85.

228. See T. McCRAW, *supra* note 5, at 68, 72; H. THORELLI, *supra* note 1, at 73–76.

229. See T. McCRAW, *supra* note 5, at 72; M. SKLAR, *supra* note 1, at 44–47; H. THORELLI, *supra* note 1, at 76–85.

230. See, e.g., T. McCRAW, *supra* note 5, at 72, 325 n.23.

231. See, e.g., M. SKLAR, *supra* note 1, at 34 (stressing the fundamentality of contemporary antitrust issues and noting that at bottom these issues centered on whether “corporate capitalism and the American liberal tradition [could] be mutually adapted the one to the other”).

232. See *id.* at 33–34.

233. See, e.g., W. LETWIN, *supra* note 167, at 85–99; H. THORELLI, *supra* note 1, at 155–56, 164–232, 352–53; May, *supra* note 4, at 498–500.

234. See, e.g., W. LETWIN, *supra* note 167, at 82–83, 143–55, 161–84, 218–37, 253–65; H. THORELLI, *supra* note 1, at 432–99, 596–604.

235. See, e.g., *infra* text accompanying notes 662, 665.

236. See, e.g., R. HOFSTADTER, *Antitrust Movement*, *supra* note 85, at 204, 207–08; R. WIEBE, *supra* note 199, at 214–18.

237. See, e.g., R. HOFSTADTER, *Antitrust Movement*, *supra* note 85, at 192.



rejection of traditional orientations.<sup>238</sup> Defenders of concentrated corporate capitalism frequently declared, for example, that natural competitive processes still could be counted on to produce normal, beneficent outcomes even when the greater efficiencies of large-scale enterprise led to concentrated markets, asserting that *potential* competition would operate powerfully to restrain big business behavior.<sup>239</sup> Similarly, observers who rejected the static natural law ideas of classical economics did not entirely reject a natural law orientation, but frequently invoked a dynamic form of natural law to proclaim new economic concentration the beneficent outcome of natural industrial evolution.<sup>240</sup>

Many contemporary Americans departed rather more substantially from traditional ideas and approved of "loose" combinations as well, condoning cartels or pools on the ground that full-blown competition sometimes did more harm than good under modern conditions.<sup>241</sup> Antitrust defendants, for example, vigorously urged this distinctly "nonclassical" perspective in early Sherman Act cases before the United States Supreme Court.<sup>242</sup> While the Supreme Court firmly rejected such arguments,<sup>243</sup> a number of late nineteenth century common law opinions,<sup>244</sup> and several lower federal court decisions<sup>245</sup> in the early to mid-1890s, demonstrated considerable sympathy for such views and upheld particular "loose" arrangements over common law or Sherman Act challenges. Although approval of such agreements often rested on a belief that changed circumstances justified a departure from traditional analyses,<sup>246</sup> even defenders of collusive, price-affecting activities often explained their position as merely a modification of still valid traditional principles, declaring that cartel arrangements could constitute a legitimate self-help remedy for abnormally occurring deviations from natural economic processes and outcomes.<sup>247</sup>

238. See M. SKLAR, *supra* note 1, at 33–40 (summarizing leading efforts to adapt traditional conceptions to an economy dominated by concentrated corporate capitalism).

239. See, e.g., W. LETWIN, *supra* note 167, at 76–77; H. THORELLI, *supra* note 1, at 123, 129 (describing such ideas in the thought of John Bates Clark and George Gunton); Giddings, *The Persistence of Competition*, 2 Pol. Sci. Q. 62, 65–67 (1887).

240. See May, *supra* note 4, at 568–70.

241. See, e.g., M. SKLAR, *supra* note 1, at 17, 33, 53.

242. See, e.g., *Northern Sec. Co. v. United States*, 193 U.S. 197, 337, 351–52 (1904); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 321, 330–31 (1897).

243. See, e.g., *Northern Sec.*, 193 U.S. at 337–38; *Trans-Missouri Freight Ass'n*, 166 U.S. at 338–39.

244. See, e.g., *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N.E. 629 (1887); *Skrainka v. Scharringhausen*, 8 Mo. App. 522 (1880).

245. See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 58 F. 58 (8th Cir. 1893), *rev'd*, 166 U.S. 290 (1897); *United States v. Joint Traffic Ass'n*, 76 F. 895 (C.C.S.D.N.Y. 1896), *aff'd mem.*, 89 F. 1020 (2d Cir. 1897), *rev'd*, 171 U.S. 505 (1898); *United States v. Nelson*, 52 F. 646 (D. Minn. 1892). See also *Dolph v. Troy Laundry Mach. Co.*, 28 F. 553 (C.C.N.D.N.Y. 1886) (common law case). But see *United States v. Jellico Mountain Coal & Coke Co.*, 46 F. 432 (C.C.M.D. Tenn. 1891) (condemning a price-fixing combination under the Sherman Act).

246. See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 321 (1897) (relating the argument of defendants that competition among contemporary railroads generated "entirely different economic results" than did competition in other lines of business due to the unique nature of railroad property).

247. Consider, for example, the antitrust sentiments of the Kentucky Court of Appeals expressed in the leading Kentucky case of *Commonwealth v. International Harvester Co.*, 131 Ky. 551, 115 S.W. 703 (1909), *overruled in Gay v. Brent*, 166 Ky. 833, 849, 179 S.W. 1051, 1058 (1915). As a prior article explains in detail, in the early years of the twentieth century the Kentucky Court of Appeals relied directly on basic classical economic theory to develop a distinctive test for judging price fixing and output limitations under state antitrust law. Under this test, collusive efforts were held lawful as long as the resulting prices did not deviate from the "real" or "natural" value posited in classical economic

A great many contemporary Americans, however, viewed both concentration and cartelization with considerably less equanimity.<sup>248</sup> In large numbers, they concluded that increased economic concentration often arose unnaturally from illegitimate forms of private rivalry or combination,<sup>249</sup> or from improper governmental favoritism,<sup>250</sup> rather than from normal competitive processes<sup>251</sup> or the greater efficiency of the businesses that came to dominate particular markets. At the same time, Americans widely reasserted a heightened, traditional hostility to cartelization as such price-enhancing activity proliferated in late nineteenth and early twentieth century America.<sup>252</sup> Believing older common law approaches inadequate to meet the newly increased dangers of concentration and cartelization,<sup>253</sup> these observers called for new antitrust legislation as an essential new means to better protect a traditionally conceived political and economic order at a time of mounting private misconduct.<sup>254</sup>

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theory. See, e.g., *Owen County Burley Tobacco Soc'y v. Brumback*, 128 Ky. 137, 149–51, 107 S.W. 710, 714 (1908); May, *supra* note 4, at 547–49, 575–84. The Kentucky court stressed that this standard would not condemn, for example, cooperative efforts by farmers to raise abnormally and unfairly depressed prices back up to the “real value” level. See, e.g., *Owen County*, 128 Ky. at 151, 107 S.W. at 714. As the court explained in *International Harvester*, it was perfectly legitimate for farmers to reduce output collectively at a time of “overproduction”:

[O]versupply would reduce the selling value to a level below the normal. If a concerted action of producers resulted in only a normal supply of a commodity reaching the markets, the normal demand would maintain normal prices. Such action is necessary, or at least seems wise both as it affects the producer and the general public. Violent depressions of a market that result in heavy losses are hurtful to everybody, because they tend to disturb the natural equilibrium of business, and reflect harmfully, or are likely to, upon every other branch of commerce. The general public can not be benefited by disaster to any legitimate business. Conditions that are stable, assuring, and reasonably profitable are best for everybody.

*International Harvester*, 131 Ky. at 576–77, 115 S.W. at 711.

248. See, e.g., R. HOFSTADTER, *Antitrust Movement*, *supra* note 85, at 189, 193, 198, 203, 208; W. LETWIN, *supra* note 167, at 70, 265, 269, 270–78; M. SKLAR, *supra* note 1, at 54–55, 85; H. THORELLI, *supra* note 1, at 162–63.

249. Louis Brandeis, for example, forcefully expressed this perspective during the 1912 presidential election campaign when he declared:

Competition . . . may be preserved by preventing that course of conduct by which in the past monopolies have been established. If we had in the past undertaken by appropriate legal and administrative machinery to prevent our financiers and others from carrying out agreements to form monopolies; if we had seriously attempted to prevent those methods of destructive or unfair competition, as are manifest in “cut-throat competition”—discrimination against customers who will not deal exclusively with the combination; if we had made any persistent, intelligent effort to stop advantages gained by railroad discrimination, espionage, or the practice of establishing “fake independents,” or to stop those who have secured control of essential raw material from denying business rivals access to it—few of the trusts, of which we now complain, would have come into existence, or would, at all events, have acquired power to control the market.

L. BRANDEIS, *Competition*, *supra* note 203, at 124. See also *id.* at 115, 117; M. SKLAR, *supra* note 1, at 54–55, 85; W. WILSON, *THE NEW FREEDOM* 165–81 (1913).

250. See, e.g., W. LETWIN, *supra* note 167, at 76; H. THORELLI, *supra* note 1, at 124; May, *supra* note 4, at 570.

251. Antitrust advocates sometimes referred to “unfair,” “ruthless,” or “cutthroat” competition in a way that suggested a form of rivalry differing only in degree from the normal forms of competition posited by classical economic theory. It is important to understand, however, that antitrust proponents widely tended to view disfavored, abnormal forms of competition as different in *kind* from ordinary competition, somewhat as physical destruction of a competitor’s plant or inventory would have been considered different in kind. Louis Brandeis, for example, explained:

Believers in competition make no suggestion that traders be compelled to compete. They ask merely that no trader should be allowed to kill competition. Competition consists in trying to do things better than someone else; that is, making or selling a better article, or the same article at a lesser cost, or otherwise giving better service. It is not competition to resort to methods of the prize ring, and simply “knock the other man out.” That is killing a competitor.

L. BRANDEIS, *Competition*, *supra* note 203, at 115.

252. Heightened concern for price fixing and for such related practices as pooling, output limitation, and territorial division is evident, for example, in the passage of numerous state antitrust statutes specifically attacking such activities. See J. DAVIES, *TRUST LAWS AND UNFAIR COMPETITION* 164–82 (1916).

253. See, e.g., R. HOFSTADTER, *Antitrust Movement*, *supra* note 85, at 197.

254. See, e.g., *id.* at 196–97.

While early antitrust law thus reflected a strong continuing faith in the basic perspectives of conventional nineteenth century theory, it did not originate because of any newly heightened concern for competition expressed by professional economists themselves. These scholars, indeed, generally disapproved of antitrust legislation,<sup>255</sup> declaring it to be unnecessary,<sup>256</sup> ineffectual,<sup>257</sup> or counterproductive.<sup>258</sup> Economists adhering most closely to classical orthodoxy remained wary of extensions of government power, and generally believed that natural forces would tend to correct new distortions in economic life without the need of expanded government intervention.<sup>259</sup> The "historical" or "new" school approaches that rose to prominence in the 1880s in opposition to classical theory, and that sparked the 1885 establishment of the American Economic Association,<sup>260</sup> generally did not support antitrust legislation significantly more strongly.<sup>261</sup> In fact, "historical" or "new" school economists frequently proclaimed that modern conditions rendered competition wholly or partially obsolete as a governing principle.<sup>262</sup> Echoing sentiments expressed, for example, by contemporary proponents of the Social Gospel,<sup>263</sup> these younger economists frequently urged a new ethic of cooperation to replace older ideals of rivalry, at least in important sectors of the American economy.<sup>264</sup> As historians repeatedly have observed, when some leading "neoclassical" economists later did express strong concerns for the maintenance of competition, their views largely reflected a movement back toward classical principles<sup>265</sup> and a belated conjunction with popular antitrust sentiments that had previously developed on the basis of traditionalist premises.<sup>266</sup>

Such traditional perspectives greatly influenced not only popular proponents of new antitrust measures, but also the federal and state legislators who enacted such provisions and the judges who applied them. The early antitrust analyses of congressmen and federal jurists discussed in the next two Parts of this Article strongly displayed the power of traditional theory. The state legislative and judicial analyses

255. See, e.g., W. LETWIN, *supra* note 167, at 75-77; G. STIGLER, *The Economists and the Problem of Monopoly, in THE ECONOMIST AS PREACHER, AND OTHER ESSAYS* 41-42 (1982); H. THORELLI, *supra* note 1, at 120-21, 567; Hovenkamp, *Labor Conspiracies*, *supra* note 107, at 939.

256. See, e.g., W. LETWIN, *supra* note 167, at 76; H. THORELLI, *supra* note 1, at 110, 565.

257. See, e.g., W. LETWIN, *supra* note 167, at 76; H. THORELLI, *supra* note 1, at 314, 321-22, 325.

258. See, e.g., W. LETWIN, *supra* note 167, at 74-75; H. THORELLI, *supra* note 1, at 123, 125-26.

259. See, e.g., H. WOOD, *supra* note 87, at 66 ("Natural Law punishes its offenders without the aid of courts or judges."). See also, e.g., H. THORELLI, *supra* note 1, at 110, 565.

260. On the rise of the "historical" or "new" school and the founding of the American Economic Association, see, for example, S. FINE, *supra* note 3, at 198-251; H. THORELLI, *supra* note 1, at 118-22.

261. See, e.g., H. THORELLI, *supra* note 1, at 120-21, 567.

262. See, e.g., Andrews, *The Economic Law of Monopoly*, 26 J. Soc. Sci. 1 (1890); Seligman, *Railway Tariffs and the Interstate Commerce Law*, 2 Pol. Sci. Q. 369 (1887). See also S. FINE, *supra* note 3, at 204; H. THORELLI, *supra* note 1, at 123, 125, 316.

263. See, e.g., S. FINE, *supra* note 3, at 200-01; H. THORELLI, *supra* note 1, at 117-19.

264. See, e.g., S. FINE, *supra* note 3, at 200-01; H. THORELLI, *supra* note 1, at 119.

265. See, e.g., S. FINE, *supra* note 3, at 247 (noting the "trend back to classical economic theory" in the 1890s), *id.* at 251; H. THORELLI, *supra* note 1, at 121, 311-12 ("Clearly, . . . neoclassicism was rooted squarely in traditional liberal economics . . .").

266. See, e.g., H. THORELLI, *supra* note 1, at 315 (noting that the changing thinking of John Bates Clark and Richard T. Ely "brought them—especially Clark—much closer to public opinion on the trust problem than they had been during the previous decade").

addressed in subsequent Parts provide striking further evidence of the strength of these ideas and offer considerable additional insight into the variety of ways in which general political and economic theory shaped early antitrust reasoning.

### III. THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND THE CURRENT DEBATE OVER CONGRESSIONAL GOALS

The congressional debates preceding passage of federal antitrust legislation in 1890 and 1914 reflected the contemporary diversity of national antitrust sentiment. Like other Americans, congressmen varied substantially in their reactions to increased concentration and cartelization. Some congressmen harbored serious doubts about the virtues of competition itself, at least in certain circumstances, and expressed considerable sympathy for self-protection through cartelization.<sup>267</sup> Most debate participants,<sup>268</sup> however, expressed substantial concern over anticompetitive activity and exhibited a strong continuing belief in traditional political and economic perspectives.<sup>269</sup>

The debates do not suggest that a majority of congressmen in 1890, or even in 1914, had come to believe that the natural, beneficent order posited by traditional theory was a fundamental impossibility; nor do they indicate that a majority perceived intrinsic or inevitable conflict among the core political and economic elements that were traditionally thought to be in natural harmony.<sup>270</sup> Instead, the debates appear to indicate a widespread congressional commitment to the long-established ideals of economic opportunity, security of property, freedom of exchange, and political liberty, and considerable hope that antitrust law might prove to be an effective vehicle for their substantial, simultaneous realization.

These basic ideals powerfully influenced congressional attitudes and activity long before the onset of antitrust agitation in the 1880s. Immediately after the close of the Civil War, for example, Senator John Sherman<sup>271</sup> and other Republicans

267. See, e.g., 21 CONG. REC. 2606, 2643 (1890) (remarks of Sen. Stewart); *id.* at 2729 (remarks of Sen. Platt); *id.* at 5954 (remarks of Rep. Morse); *id.* at 5956 (remarks of Rep. Stewart). See also W. LETWIN, *supra* note 167, at 97.

268. See, e.g., H. THORELLI, *supra* note 1, at 190, 197–98, 226; Bork, *supra* note 15, at 22–23.

269. See generally W. LETWIN, *supra* note 167, at 85–99, 273–78; H. THORELLI, *supra* note 1, at 164–232; Bork, *supra* note 15; Lande, *supra* note 15. Congressional invocation of common law terminology in the Sherman Act at a time when a number of common law decisions had approved of cartel activity in certain circumstances, see *supra* text accompanying note 244, does not demonstrate that a majority in Congress in 1890 similarly approved of such anticompetitive behavior. The developed body of common law by 1890 contained conflicting strands of decisions and offered support for both defenders and opponents of anticompetitive loose arrangements. See *infra* text accompanying notes 524–608. See generally, e.g., E. KINTNER, *supra* note 15, at §§ 2.1–3.16; W. LETWIN, *supra* note 167, at 18–52, 77–85; H. THORELLI, *supra* note 1, at 9–53. Moreover, as William Letwin, for example, has pointed out, a strong contemporary belief prevailed among judges and lawyers that the common law generally favored competition and abhorred monopoly. See W. LETWIN, *supra* note 167, at 81 & nn.3–5. The explicit congressional citations to decided case law exhibit such a perception and were invoked primarily to support condemnation of anticompetitive behavior. Thus, in the most prominent and detailed exposition of relevant case law, Senator Sherman cited a half-dozen recent cases by way of illustration, yet not one of these cases supported cartelistic or other anticompetitive behavior; indeed, the cited cases firmly condemned such conduct. See 21 CONG. REC. 2457–59 (1890); H. THORELLI, *supra* note 1, at 183; Bork, *supra* note 15, at 22 & n.40, 25 & n.54; Clark, *supra* note 15, at 1143–44.

270. See *supra* text accompanying notes 86–153.

271. Sherman joined the United States Senate in 1861 after serving six years in the House of Representatives. See H. THORELLI, *supra* note 1, at 167.

expressed the free labor philosophy on which their party was founded<sup>272</sup> in their efforts to safeguard the fundamental rights of former slaves through the Reconstruction Amendments<sup>273</sup> and related legislation.<sup>274</sup> After the eradication of slavery had been accomplished through adoption of the thirteenth amendment,<sup>275</sup> Republican congressmen next focused not on such "political" or "social" issues as voting or segregation, but on basic economic "civil rights," which they firmly believed to be more fundamental.<sup>276</sup> Thus, the Civil Rights Act of 1866<sup>277</sup> did not address suffrage or social segregation, but instead sought to complement the thirteenth amendment's free labor guarantee by protecting the foundational rights of property and free exchange, and the related rights of court enforcement and equal, nondiscriminatory treatment in law.<sup>278</sup>

When Senator Sherman and other congressmen debated the merits of new antitrust legislation a quarter-century later, they did so largely within this same "traditionalist"<sup>279</sup> frame of reference. As the leading early proponent of congressional antitrust activity,<sup>280</sup> Senator Sherman promoted such legislation as essential protection for basic economic rights and political freedom and expressly proclaimed his proposal<sup>281</sup>

272. See generally E. FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970).

273. U.S. CONST. amends. XIII, XIV, XV.

274. On congressional reconstruction efforts, see H. BELZ, *EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA* 47-150 (1978); M. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); E. FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 228-80 (1988); H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 295-303, 309-13, 386-426, 439-72 (1982); Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221 (1987).

275. U.S. CONST. amend. XIII.

276. On the economic conception of "civil rights" at this time, and the belief that these rights were more fundamental than "political" and "social" rights, see H. BELZ, *supra* note 274, at 108-09, 116; H. HYMAN & W. WIECEK, *supra* note 274, at 395-98; Maltz, *supra* note 274, at 225-26, 250.

277. The Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

278. The Act declared that

all persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other . . .

*Id.* § 1, 14 Stat. at 27.

279. The principles of economic opportunity and political freedom, as well as the related ideas of competition and efficiency expressed in the debates, are more appropriately designated as "traditional" perspectives than "populist" notions. Indeed, it is ironic that many of the traditional ideas reflected in formative era congressional discussion repeatedly are labeled "populist" notions in current antitrust discourse. See, e.g., I P. AREEDA & D. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶¶ 109-112 (1978) (discussing "populist" goals in antitrust law). The conservative United States Supreme Court Justices and state jurists who asserted such ideas as a part of laissez-faire constitutionalism hardly seem to have been predominantly "populist" in outlook. Moreover, Senator Sherman, the chief congressional proponent of these ideas, was someone very far removed from late nineteenth century populist politics. In 1890 Sherman ranked as perhaps the most eminent and experienced congressional member of the Republican Party that would resoundingly defeat the Populist-Democratic presidential crusade of William Jennings Bryan six years later. On Sherman, see W. LETWIN, *supra* note 167, at 87; H. THORELLI, *supra* note 1, at 167. On the watershed election of 1896, see M. KELLER, *supra* note 85, at 580-87.

280. See, e.g., H. THORELLI, *supra* note 1, at 226; Bork, *supra* note 15, at 14-15; Lande, *supra* note 15, at 84. Sherman's views have been said to reflect the antitrust goals of Congress in general in 1890. See Bork, *supra* note 15, at 45.

281. S. 1, 51st Cong., 1st Sess. (1889), reprinted in 1 *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* 89-90 (E. Kintner ed. 1978). As originally introduced, Sherman's bill addressed arrangements tending "to prevent full and free competition" or tending to "advance the cost to the consumer." After several

“a bill of rights, a charter of liberty”<sup>282</sup> designed to protect “the industrial liberty of the citizens of these States.”<sup>283</sup> While Sherman expressed considerable sympathy for newly emerging patterns of corporate efficiency, he nevertheless emphasized the fundamentality of traditional economic and political principles, and sharply distinguished rights-based, productive activity from the pernicious behavior his bill would ban. In an often-cited passage, for example, he declared:

It is said that this bill will interfere with lawful trade, with the customary business of life. I deny it. It aims only at unlawful combinations. It does not in the least affect combinations in aid of production where there is free and fair competition. It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty and lies at the foundation of the equality of all rights and privileges.<sup>284</sup>

Similarly, in the initial resolution that Sherman proposed and that the Senate adopted in 1888, directing the Committee on Finance to explore and report on possible new antitrust measures, Sherman highlighted core conventional principles when he declared the purposes of antitrust legislation to include the preservation of “freedom of trade and production, the natural competition of increasing production, [and] the lowering of prices by such competition.”<sup>285</sup>

Throughout the debates, Sherman continued to embrace traditional nineteenth century assumptions treating economic opportunity, efficiency, competition, wealth distribution, and political liberty as all of a piece. In strongly urging the passage of new federal antitrust legislation, Sherman did not focus on any single economic harm alone, but instead stressed the multiplicity of economic, social, and political evils that the increasing concentration of wealth already had generated. Evoking traditional fears,<sup>286</sup> he warned:

The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarean arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life.<sup>287</sup>

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amendments, the bill was sent to the Senate Judiciary Committee, which produced a differently worded draft, *see* S. 1, 51st Cong., 1st Sess., 21 CONG. REC. 2901 (1890) (as amended), that subsequently was enacted into law as the Sherman Antitrust Act. *See, e.g.,* W. LETWIN, *supra* note 167, at 85–95; H. THORELLI, *supra* note 1, at 166–210. Although most of the debates in the 51st Congress focused on earlier draft language that was different from the language ultimately adopted, the debates nevertheless have generally been thought to reflect the goals and sentiments behind passage of the final version. *See, e.g.,* Bork, *supra* note 15, at 44–47. *But see* Peritz, *supra* note 8, at 291–313 (arguing that the final draft language represented an important congressional policy shift from the earlier draft). On the possible inferences to be drawn from the use of common law terminology in the final bill, and their relative persuasiveness, *see supra* note 269.

282. 21 CONG. REC. 2461 (1890).

283. *Id.* at 2457.

284. *Id.* *See also infra* text accompanying notes 325–28.

285. 19 CONG. REC. 6041 (1888).

286. *See, e.g.,* W. LETWIN, *supra* note 167, at 59–70.

287. 21 CONG. REC. 2460 (1890).

Sherman's perception of contemporary economic and political dangers developed within an overall conceptual framework commonly, if not universally, accepted by other state and federal legislators. When legislators in New York supported major new antitrust legislation in the late 1890s, for example, they explicitly detailed their motivating economic and political vision in terms that closely mirrored the core perspectives of political liberalism and classical economics.<sup>288</sup> While federal legislators did not discuss general theory in comparable detail, much of the congressional debate commentary strongly, if less systematically, displayed a similar orientation, and traditional general theory appears to have influenced more particularized congressional analyses substantially.

When Senator Sherman and other congressmen discussed competitive pricing, efficiency, economic opportunity, and political freedom during the formative era, each of these principles tended to take on a somewhat different total significance than it does today because it fit into a different larger whole, consisting of a different overall interrelationship among these various elements. Today these principles take on larger meaning because of their placement within a neoclassical paradigm stressing marginal cost and marginal revenue, consumers' surplus, and allocative efficiency.<sup>289</sup> In 1890 or 1914 they took on larger meaning as part of a still widely accepted classical paradigm stressing basic natural rights of labor, property, and exchange and the labor theory of value.<sup>290</sup>

Evidence of the power of this earlier frame of reference appears repeatedly throughout the congressional deliberations. In both the early and later debates, for example, congressmen frequently affirmed the rights-based and often moralistic perspectives of traditional nineteenth century theory<sup>291</sup> in their continual, explicit, and pointed denunciations of supracompetitive pricing as "extortion,"<sup>292</sup> "robbery,"<sup>293</sup> and "theft."<sup>294</sup> When members of Congress repeatedly praised productive efficiency even on the part of giant corporate enterprises, their comments rested on a similarly traditional foundation. Increased productive efficiency long had been considered an important outcome of the process of specialization associated with the right and prevalence of exchange,<sup>295</sup> and some degree of productive combination of effort beyond individual activity long had been accepted as natural and legitimate

288. See *infra* text accompanying notes 621–51.

289. See, e.g., R. BORK, *supra* note 6, at 107–15; R. LIPSEY, P. STEINER & D. PURVIS, *ECONOMICS* 1–455 (8th ed. 1987); E. MANSFIELD, *MICROECONOMICS* (6th ed. 1988); P. SAMUELSON & W. NORDHAUS, *ECONOMICS* (12th ed. 1985).

290. See *supra* text accompanying notes 86–129.

291. See, e.g., *supra* text accompanying notes 86–107.

292. See, e.g., in the Sherman Act debates, 21 CONG. REC. 2461 (1890) ("extortion which makes the people poor") (remarks of Senator Sherman); *id.* at 1768 (remarks of Senator George); in the Federal Trade Commission Act debates, *Report of the Senate Committee on Interstate Commerce, Appendix: Statement by Senator Newlands*, S. REP. NO. 597, 63d Cong., 2d Sess. 25 (1914); in the 1914 Clayton Act debates, 51 CONG. REC. 14,223 ("The chief purpose of antitrust legislation is for the protection of the public, to protect it from extortion . . .") (remarks of Senator Thompson).

293. See, e.g., in the Sherman Act debates, 21 CONG. REC. 2614 (1890) (remarks of Representative Coke); *id.* at 3150 (remarks of Senator George); in the Federal Trade Commission Act debates, 51 CONG. REC. 13,223 (1914) (people "are being robbed") (remarks of Senator Lane).

294. See, e.g., in the Federal Trade Commission Act debates, 51 CONG. REC. 13,223 (1914) ("fraud and . . . theft . . . being practiced upon the people") (remarks of Senator Lane).

295. See *supra* notes 96–100 and accompanying text.

in mainstream classical writing.<sup>296</sup> When congressmen in 1890 invoked this principle to approve the new productive efficiencies of formative era corporations, they did not necessarily abandon traditional economic theory.<sup>297</sup>

Two efficiency-related developments beyond the "overcapacity" difficulties already noted<sup>298</sup> threatened to undermine faith in an economic order promoting the full, simultaneous realization of economic opportunity, security of property, and competitive, free exchange. One troubling situation was that of market dominance attained solely by superior skill and efficiency without any resort to predation or multifirm combination. The Senate debate focused on this possibility just prior to Senate passage of the redrafted bill<sup>299</sup> that became the Sherman Antitrust Act.<sup>300</sup> In a well-known colloquy, Senator Kenna of West Virginia asked:

Suppose a citizen of Kentucky is dealing in shorthorn cattle and by virtue of his superior skill in that particular product it turns out that he is the only one in the United States to whom an order comes from Mexico for cattle of that stock for a considerable period, so that he is conceded to have a monopoly of that trade with Mexico; is it intended by the committee that the bill shall make that man a culprit?<sup>301</sup>

In reply, Senators Edmunds and Hoar appealed to long-established understandings of "monopoly" to assure their colleagues that the bill would have no such effect. The understandings they invoked reflected full acceptance of competitive efforts "to furnish the commodity for the lowest price,"<sup>302</sup> and confined the term "monopoly" to situations of market dominance achieved through private or governmental activity that artificially impeded free competition. Senator Edmunds stressed that in the hypothetical posed by Senator Kenna there was "not any monopoly at all"<sup>303</sup> because the dealer had not improperly "bought off his adversaries"<sup>304</sup> or artificially cornered the market by getting "the possession of all the horned cattle in the United

296. See, e.g., F. WAYLAND, *supra* note 86, at 92 ("Some concentration of capital is . . . essential to the most effective division of labor.").

297. Senator Sherman, for example, expressly analogized productive corporations to the productive partnerships that had long been accepted as an important part of national economic life. In Sherman's view, both partnerships and corporations were lawful and quite beneficial, see 21 CONG. REC. 2457 (1890), provided that they were not illegitimately established

with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer. It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination.

*Id.* Sherman perceived no competitive threat from such useful partnerships and corporations as long as "[t]he same business is open to every other partnership" and other corporations could be formed on equal terms. *Id.* The "trusts," however, constituted an entirely different, "new form of combination . . . that seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man . . ." *Id.* This distinctly different kind of combination assertedly posed severe dangers that were not posed by ordinary partnerships and corporations, and, accordingly, called for strong legal countermeasures. See *id.* See also *infra* note 319.

298. See *supra* text accompanying notes 222-26.

299. See *supra* note 281.

300. Sherman Antitrust Act, ch. 647, §§ 1-8, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

301. 21 CONG. REC. 3151 (1890).

302. *Id.* at 3152 (remarks of Sen. Edmunds).

303. *Id.* at 3151.

304. *Id.* at 3152.



States.”<sup>305</sup> Senator Hoar reaffirmed traditional theory even more explicitly, explaining:

the word “monopoly” is a merely technical term which has a clear and legal signification, and it is this: It is the sole engrossing to a man’s self by means which prevent other men from engaging in fair competition with him.

Of course a monopoly granted by the King was a direct inhibition of all other persons to engage in that business or calling or to acquire that particular article, except the man who had a monopoly granted him by the sovereign power. I suppose, therefore, that the courts of the United States would say in the case put by the Senator from West Virginia that a man who merely by superior skill and intelligence, a breeder of horses or raiser of cattle, or manufacturer or artisan of any kind, got the whole business because nobody could do it as well as he could was not a monopolist, but that it involved something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same business.<sup>306</sup>

Traditional nineteenth century economic thought focused very heavily on such private or governmental impropriety as the source of substantial deviations from competitive market conditions<sup>307</sup> and acknowledged only very few situations of “natural” monopoly.<sup>308</sup> Before the increasing size and significance of scale economies created more serious impediments to new entry in a large number of markets in the late nineteenth and early twentieth centuries, economic observers largely assumed that positions of market dominance based only on superior skill would not severely harm opportunity or competitive pricing. Any attempt to maintain abnormally high prices, they believed, would tend to be thwarted in the long run by the entry of efficient new competitors.<sup>309</sup> The famous Senate colloquy just noted heavily reflected this conventional nineteenth century perspective. Still influenced by a powerful vision of economic life premised on earlier nineteenth century realities, the participants never acknowledged, much less addressed, the possibility that persistent market power in cattle dealing or elsewhere might arise not from private or public misconduct but instead from new technological or distributional economies of scale.<sup>310</sup>

The second situation that raised potentially troubling questions for traditional theory was the attainment of market dominance through forms of “tight” combination that seemingly generated new efficiencies even while simultaneously impairing economic opportunity and competitive, free exchange. By the late nineteenth century, many economists already had come to view large scale economies as a pervasive fact of life that fundamentally and inevitably altered basic economic patterns in many, if not all, sectors of the economy.<sup>311</sup> As a result, these analysts

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305. *Id.*

306. *Id.*

307. See *supra* text accompanying notes 139–46, 168–77.

308. See, e.g., G. STIGLER, *supra* note 255, at 38–41; Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, in *CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY* 13, 27 (W. Samuels & A. Miller eds. 1987) [hereinafter Horwitz, *Corporate Theory*].

309. See *supra* text accompanying notes 106–07.

310. See 21 CONG. REC. 3151–52 (1890).

311. See, e.g., H. C. ADAMS, *Relation of the State to Industrial Action*, in *TWO ESSAYS BY HENRY CARTER ADAMS*

accepted the legitimacy of many market-dominating combinations and called for public ownership or rate regulation as the essential complement for this new stage of industrial development.<sup>312</sup> Contemporary congressmen did not yet widely share these new perspectives,<sup>313</sup> however, especially in 1890 when the greatest "wave" of merger activity still lay in the future.<sup>314</sup> While some congressional observers questioned the continued viability, or even desirability, of vigorous, free competition in at least some modern circumstances,<sup>315</sup> congressional antitrust advocates generally stressed bad conduct as the root cause of modern economic problems and sought to achieve a revitalized competitive order through new legislation.<sup>316</sup>

The new prominence of private economic activity that enhanced efficiency but seemingly impaired basic rights of labor, property, and exchange presented a disturbing anomaly. Congressmen heavily influenced by the general perspectives of conventional nineteenth century political and economic theory reacted as believers in a particular paradigm quite often do when faced with seemingly contradictory evidence. As Thomas Kuhn, for example, has pointed out in describing the power and development of explanatory paradigms in the history of science,<sup>317</sup> it typically is the case that believers try hard to maintain their existing paradigm by refining or adapting it in light of anomalous new data before they discard the old paradigm for some entirely new one.<sup>318</sup> Congressional supporters of new antitrust legislation reacted to market-dominating but efficient combinations in much the same manner. Rather than embrace any fundamentally new economic theory, they sought to assimilate this unusual element into a traditional vision. Thus, antitrust advocates strongly analogized such combinations to other forms of unnatural, abnormal, artificial interference with economic life,<sup>319</sup> and minimized the importance of the

57 (J. Dorfman ed. 1969). See also S. FINE, *supra* note 3, at 224-25 (on Henry Carter Adams), 231-32 (on Richard T. Ely); W. LEWIN, *supra* note 167, at 74, 77; H. THORELLI, *supra* note 1, at 123 (on John Bates Clark), 124 (on Richard T. Ely), 125 (on E. Benjamin Andrews).

312. See, e.g., Andrews, *supra* note 262, at 12; Jenks, *Capitalistic Monopolies and Their Relation to the State*, 9 POL. SCI. Q. 486, 504-09 (1894); Seligman, *supra* note 262, at 373-74.

313. See *supra* text accompanying notes 268-69.

314. See, e.g., M. SKLAR, *supra* note 1, at 45-47; H. THORELLI, *supra* note 1, at 306, 573. See generally N. LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904* (1985).

315. See *supra* note 267.

316. See generally sources cited *supra* note 269.

317. See generally T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (the seminal work on the power of paradigms in scientific work and development).

318. See *id.* at 66-91.

319. As already noted, Senator Sherman, for example, treated monopolistic combinations or "trusts" as distinctly different in kind from ordinary, productive combinations, whether in the form of partnerships or corporations. See *supra* note 297. Monopolistic combinations, he believed, presented an illegitimate, artificial intrusion that posed a grave economic threat and demanded a vigorous legal response:

The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. Such a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry in all of the States of the Union, it tends to advance the price to the consumer of any article produced, it is a substantial monopoly injurious to the public, and, by the rule of both the common and the civil law, is null and void and the just subject of restraint by the courts, of forfeiture of corporate rights and privileges, and

efficiencies these combinations generated, by asserting that such efficiencies benefitted only the combination members themselves and not the public at large.<sup>320</sup>

The traditionalist perspectives reflected in early congressional commentary on competitive pricing and productive efficiency appeared even more strongly in discussions of economic opportunity and political freedom. Early congressional emphasis on the maintenance of entrepreneurial opportunity, for example, heavily reflected a traditional nineteenth century perception of small business activity that varied substantially from common late twentieth century perspectives. Modern antitrust scholars often view small firms largely as less efficient operators seeking special protection at the expense of consumers.<sup>321</sup> For most of the nineteenth century, however, small proprietors were considered to be the vibrant heart of economic life,<sup>322</sup> indeed, archetypical examples of the "free laborers" who were thought to be central to the natural economic order of classical economic theory.<sup>323</sup> Senator Sherman, for instance, strongly reaffirmed such traditional views when he prominently proclaimed the fundamentality of free labor and substantially promoted his bill on the ground of industrial liberty.<sup>324</sup> Others in Congress in 1890<sup>325</sup> and, more widely, in 1914<sup>326</sup> seconded his sentiments. As Senator Burton, for example, declared in 1914: "In our business life there must be a free field for all, and along with this tendency toward operations on an enormous scale no policy should be adopted or allowed under which equality of opportunity shall be destroyed or the deserving competitor driven out of business."<sup>327</sup> Or, as Senator Reed expressed it in the same Federal Trade Commission Act debates:

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in some cases should be denounced as a crime, and the individuals engaged in it should be punished as criminals. It is this kind of a combination we have to deal with now.

21 CONG. REC. 2457 (1890).

320. Thus, Senator Sherman emphasized:

It is sometimes said of these combinations that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes to the pockets of the producer. The price to the consumer depends upon the supply, which can be reduced at pleasure by the combination. It will vary in time and place by the extent of competition, and when that ceases it will depend upon the urgency of the demand for the article. The aim is always for the highest price that will not check the demand, and, for the most of the necessities of life, that is perennial and perpetual.

*Id.* at 2460.

321. See, e.g., R. BORK, *supra* note 6, at 46-47.

322. See, e.g., R. HOFSTADTER, *Antitrust Movement*, *supra* note 85, at 196-97, 210-11.

323. See *supra* text accompanying notes 90-92.

324. See *supra* text accompanying notes 282-84.

325. See, for example, the 1890 remarks of Senator George, declaring:

It is a sad thought to the philanthropist that the present system of production and of exchange is having that tendency which is sure at some not very distant day to crush out all small men, all small capitalists, all small enterprises. This is being done now. We find everywhere over our land the wrecks of small, independent enterprises thrown in our pathway. So now the American Congress and the American people are brought face to face with this sad, this great problem: Is production, is trade, to be taken away from the great mass of the people and concentrated in the hands of a few men . . . ?

21 CONG. REC. 2598 (1890). See also, e.g., *id.* at 4100 (remarks of Representative Mason); Lande, *supra* note 15, at 101-05.

326. See, e.g., Lande, *supra* note 15, at 120-21.

327. 51 CONG. REC. 14,792 (1914).

We are trying to keep the doors of competition open in this land. We are trying to keep the highways of opportunity unobstructed. We are trying to keep it so that the feet of the men of to-day may travel along an open path, so that all may have a fair chance to gain a livelihood and to embark in business.<sup>328</sup>

Congressional comments on the symmetry of economic and political freedom and the need for antitrust law in order to protect political liberty also reflected long-familiar perspectives invoked in response to a newly prominent danger. The numerous congressional declarations of alarm over the threats posed by recent economic innovations, indeed, strongly paralleled the traditional anxieties over government innovation that Progressive Era judges so frequently and prominently expressed in contemporary constitutional jurisprudence.

While adherents to laissez-faire constitutionalism sought to eliminate threats to basic rights posed by unchecked public authority and government favoritism,<sup>329</sup> congressional antitrust supporters sought to block similar threats arising from unchecked private authority and illegitimate private enhancement of economic power. As Senator Sherman warned:

If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.<sup>330</sup>

While contemporary constitutional analysts denounced state paternalism as a threat to the critical vigor of American individualism and a danger to political and economic independence,<sup>331</sup> congressional antitrust advocates warned that industrial consolidation likewise threatened to create dangerous permanent hierarchies of dominance and subordination among individuals in the economic realm. Senator Cummins, for example, pointedly expressed this fear in the 1914 Federal Trade Commission Act debates when he urged that

we must do something to preserve the independence of the man as distinguished from the power of the corporation; that we must do something to perpetuate the individual initiative.

We often go wrong, I believe, in assuming that because a great corporation, a vast aggregation of wealth, can produce a given commodity more cheaply than can a smaller concern, therefore it is for the welfare and the interest of the people of the country that the commodity shall be produced at the lower cost. I do not accept that article of economic faith. I think we can purchase cheapness at altogether too high a price, if it involves the surrender of the individual, the subjugation of a great mass of people to a single master mind.<sup>332</sup>

While traditional political and economic theorists declared that discriminatory special legislation bred class resentment and conflict,<sup>333</sup> congressional antitrust supporters proclaimed that private economic impropriety bred artificial inequalities of wealth generating these same evils in a parallel fashion. Thus, Senator Sherman's

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328. *Id.* at 13,231.

329. *See supra* text accompanying notes 152–97.

330. 21 CONG. REC. 2457 (1890).

331. *See supra* text accompanying notes 186–93.

332. 51 CONG. REC. 12,742 (1914).

333. *See supra* text accompanying notes 164–66.

previously quoted reference to popular agitation over a growing inequality of condition<sup>334</sup> was echoed in such other congressional comments as Senator Borah's dire 1914 warning that monopolies "divide our people into classes, breed discontent and hatred, and in the end riot, bloodshed, and French revolutions."<sup>335</sup>

Finally, while late nineteenth century political theorists commonly predicted that state favoritism would spark a battle for the control of government itself and the ultimate subversion of liberal republican institutions,<sup>336</sup> early antitrust proponents warned that the improper private attainment of disproportionate economic power could lead to precisely the same catastrophe. Like the Jacksonian liberals who came before them,<sup>337</sup> antitrust proponents feared both business domination and popular leveling. Senator Hoar, for example, echoed Senator Sherman's declaration that the great new combinations already "reach State authorities"<sup>338</sup> when he warned in 1890 that the great monopolies constituted "a menace to republican institutions themselves."<sup>339</sup> Fears of political domination by big business were powerfully reiterated in Congress during the 1914 Clayton Act debates, both in report language and in comments by individual congressmen.<sup>340</sup> The House committee report on the interlocking directorships section of the bill, for example, cautioned that "[t]he concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions."<sup>341</sup> Similarly, Representative Kelly expressed the sentiments of many in Congress when he declared:

Enterprises with great capital have deliberately sought not only industrial domination but political supremacy as well. . . .

. . . .

. . . Great combinations of capital for many years have flaunted their power in the face of the citizenship, they have forced their corrupt way into politics and government, they have dictated the making of laws or scorned the laws they did not like, they have prevented the free and just administration of law. In doing this they have become a menace to free institutions, and must be dealt with in patriotic spirit, without fear or favor.<sup>342</sup>

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334. See *supra* text accompanying note 287.

335. 51 CONG. REC. 15,955 (1914). Such concerns were not merely a "populist" notion utterly foreign to nineteenth century American classical economics. As early as 1878, for example, Wayland and Chapin's leading economics text also prominently warned of the class dangers of undue concentration of capital, declaring:

1. A general Distribution of Capital is a matter of prime importance. By this is meant such a condition of things that the capital of a country shall be in many hands rather than few,—that laborers themselves shall have, or be encouraged to secure some capital. . . . Some concentration of capital is . . . essential to the most effective division of labor. But beyond this necessity, the great aggregation of capital in the possession of individuals is disadvantageous because it leads inevitably to despotic assumption on the one hand, and to envyings and jealousies on the other.

F. WAYLAND, *supra* note 86, at 92.

336. See *supra* text accompanying notes 166–67.

337. See *supra* text accompanying notes 157–60.

338. See *supra* text accompanying note 287.

339. 21 CONG. REC. 3146 (1890).

340. See, e.g., Lande, *supra* note 15, at 129–30.

341. H. R. REP. NO. 627, 63d Cong., 2d Sess. 19 (1914).

342. 51 CONG. REC. 9086 (1914).

As previously noted, Jacksonian liberals and their intellectual heirs warned not only of business hegemony, but also of government control by a discriminatory popular majority, declaring that the latter condition would prompt a defensive, victorious counterattack leading to the establishment of plutocratic tyranny.<sup>343</sup> Congressional antitrust advocates warned of the reverse scenario. Artificial, illegitimate "trust" activity creating disproportionate private power at the expense of the people at large, they cautioned, could spark a defensive *majoritarian* reaction leading to the ultimate *popular* subversion of republican institutions. As Senator Sherman warned his colleagues: "They had monopolies and mortmains of old, but never before such giants as in our day. You must heed [the people's] appeal or be ready for the socialist, the communist, and the nihilist."<sup>344</sup>

Modern commentators acknowledge that the congressional debates reflect simultaneous concerns for competitive pricing, efficiency, economic opportunity, and political freedom.<sup>345</sup> Antitrust scholars frequently stress, however, that congressmen discussed competition and efficiency significantly more often than they discussed other concerns,<sup>346</sup> particularly in 1890.<sup>347</sup> Recent interpretations of early congressional intent also emphasize the paucity of congressional commentary endorsing even the partial sacrifice, or "tradeoff," of some concerns for the sake of others.<sup>348</sup> They further note the absence of any expressed or likely congressional desire to entrust federal judges with an open-ended mandate to balance a "bunch of inconsistent goals."<sup>349</sup> On the basis of this evidence, antitrust writers widely conclude that Congress implicitly identified the more extensively discussed concern for competitive pricing<sup>350</sup> or "consumer welfare"<sup>351</sup> as the dominant<sup>352</sup> or even sole<sup>353</sup> general goal of antitrust legislation.<sup>354</sup>

These current scholarly positions heavily reflect a late twentieth century perception of serious potential conflict among the various values and principles of

343. See *supra* note 167 and accompanying text.

344. 21 CONG. REC. 2460 (1890).

345. See, e.g., R. BORK, *supra* note 6, at 50–71; E. KINTNER, *supra* note 15, at §§ 4.1–4.18; Arthur, *Farewell*, *supra* note 12, at 277–91; Bork, *supra* note 15; Clark, *supra* note 15, at 1136–46; Easterbrook, *supra* note 12, at 1702–03; Fox & Sullivan, *supra* note 9, at 936, 940; Lande, *supra* note 15.

346. See, e.g., R. BORK, *supra* note 6; Bork, *supra* note 15; Clark, *supra* note 15; Easterbrook, *supra* note 12; Lande, *supra* note 15.

347. See, e.g., R. BORK, *supra* note 6, at 63; Lande, *supra* note 15, at 105–30.

348. See, e.g., R. BORK, *supra* note 6, at 66.

349. Easterbrook, *supra* note 12, at 1703 ("Judges ought not read a statute that speaks of competition, monopoly, and other economic terms, written against a legislative history that evinces concern for low prices and consumers' welfare, as if Congress winked and really meant to pursue a bunch of inconsistent goals.") (footnote omitted).

350. See Lande, *supra* note 15.

351. See R. BORK, *supra* note 6, at 57, 61–66.

352. See Lande, *supra* note 15, at 68–69 (declaring that Congress sought to promote a number of social, economic, and political goals but that in cases of conflict it "intended to subordinate all other concerns to the basic purpose of preventing firms with market power from directly harming consumers").

353. See R. BORK, *supra* note 6, at 57, 61–66; Easterbrook, *supra* note 12, at 1703.

354. As Judge Frank Easterbrook recently has described early congressional intent:

The choice they saw was between leaving consumers at the mercy of trusts and authorizing the judges to protect consumers. However you slice the legislative history, the dominant theme is the protection of consumers from overcharges. This turns out to be the same program as one based on "efficiency." . . . The few references in the legislative history to "small dealers" are a sideshow.

Easterbrook, *supra* note 12, at 1702–03 (footnote omitted).

economic opportunity, competitive pricing, efficiency, and political freedom. They also heavily reflect powerful modern concerns about the appropriate institutional role of federal judges. Indeed, current interpretations of early congressional goals and intentions, across the entire spectrum of scholarly antitrust opinion, tend to be interlinked heavily with conceptions of the proper role of antitrust judges and, particularly, the appropriate limits of judicial discretion. Scholars who believe that Congress established multiple general goals tend to accept the necessity and legitimacy of more substantial judicial discretion<sup>355</sup> than do scholars who believe in a narrower reading of congressional aims and intentions.<sup>356</sup> In short, modern antitrust analysts tend to accept the inevitability of a choice between multiple congressional goals and broad judicial discretion on the one hand, and narrower congressional intentions and more limited judicial discretion on the other.

These current perspectives and concerns seem problematic as a guide to historical understanding of formative era antitrust thought, for reliance upon them projects modern questions and assumptions into a substantially different climate of opinion. In particular, the continual search for Congress' original choice or priorities among competing general goals seems to miss a central point. In 1890 and 1914 a majority of congressmen appear to have implicitly or explicitly believed what modern commentators uniformly cannot accept: that all of these goals of opportunity, efficiency, competition, fair distribution, and political freedom were central, largely consistent, and capable of vigorous implementation through "nondiscretionary" judicial decisionmaking.

To the extent that traditional economic perspectives still held sway, it is difficult to accept the inferences urged in recent accounts of early legislative intent. Classical economic theory centrally and strongly asserted that the various economic, social, and political elements now conceived of as largely independent and inevitably conflicting were in fact naturally in harmony and crucially interdependent,<sup>357</sup> and, indeed, that the optimal realization of the full benefits of economic opportunity, competition, and political freedom tended to depend upon the simultaneous presence and vigor of one another.<sup>358</sup> Accordingly, if most congressmen in 1890 or 1914 explicitly or implicitly embraced the powerful general principles of classical theory, as it seems likely they did, it appears unlikely that their disproportionate attention to pricing concerns and silence on tradeoffs necessarily indicates a desire to protect only one part of the natural system while leaving aside or sharply subordinating the rest.

Heightened discussion of supracompetitive pricing or monopolistic mergers may simply indicate that congressmen in 1890 perceived such activity to be the most prominent and most immediately threatening danger to the natural economic order and the fundamental natural rights of labor, property, and exchange. While they may have been particularly agitated over these forms of private artificial interference with

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355. See, e.g., Fox & Sullivan, *supra* note 9; Hovenkamp, *Antitrust Policy*, *supra* note 9.

356. See, e.g., R. BORK, *supra* note 6, at 72-89; Arthur, *Workable Antitrust Law*, *supra* note 15; Easterbrook, *supra* note 12, at 1703.

357. See *supra* text accompanying notes 86-125.

358. See *supra* text accompanying notes 126-29.

natural economic processes, their use of generic prohibitions of restraints of trade at least arguably indicates their more general, fundamental concern to eliminate any private activity artificially restraining or impeding the natural laws of trade as they understood them. Simultaneously, the use of general common law terms seemingly indicates their desire to leave to the courts the "objective" task of more precise identification of artificial restraints,<sup>359</sup> a task they likely assumed could and would be accomplished through the orthodox, "nondiscretionary" judicial methodology of the time.<sup>360</sup> When circumstances changed and other dangers, such as exclusion of small firms, appeared to loom comparatively larger, congressmen devoted more attention to these dangers in the 1914 antitrust debates,<sup>361</sup> even while substantially retaining the same traditional background frame of reference in which various elements today believed to be inconsistent or subversive largely continued to be perceived as harmonious and simultaneously essential. The general absence of discussion of "tradeoffs" likely reflects, in short, not an implicit, but largely unarticulated, preference for the aspects of natural economic life most extensively discussed, or a failure to recognize the inevitability of conflict because of ignorance of economic theory, but the logical outcome of an economic theory that powerfully insisted that in general no tradeoffs were necessary or desirable.

Once Congress had established new legislation to preserve economic essentials, it became the responsibility of federal judges, and ultimately of the United States Supreme Court, to carry out this mandate. As already noted, the traditional political and economic outlook repeatedly reinforced in contemporary constitutional adjudication formed the general theoretical framework for this judicial enterprise throughout the formative era. The leading judicial theorists of early federal antitrust law displayed particularly striking evidence of the power of this perspective in their antitrust analyses both on and off the bench, and it is to the thought of these leading theorists that this Article now turns.

#### IV. JUDICIAL INTERPRETATION OF THE SHERMAN ACT

During the formative era, debate over the appropriate standard for Sherman Act analysis revolved chiefly around three proposed general formulations.<sup>362</sup> Judge William Howard Taft's ancillary/nonancillary framework announced in the case of *United States v. Addyston Pipe & Steel Co.*<sup>363</sup> offered a powerful approach for

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359. As Senator Sherman declared during the 1890 debates:

I admit it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries. This bill is only an honest effort to declare a rule of action . . .

21 CONG. REC. 2460 (1890).

360. See *supra* text accompanying notes 57-66.

361. See, e.g., R. BORK, *supra* note 6, at 63-66; Lande, *supra* note 15, at 106-30.

362. For accounts of the federal debate, see R. BORK, *supra* note 6, at 21-47; W. LETWIN, *supra* note 167, at 143-265; H. THORELLI, *supra* note 1, at 445-77.

363. 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899).



distinguishing beneficial from economically harmful arrangements.<sup>364</sup> Yet, while it may have been influential or at least suggestive of developing patterns in other contemporary antitrust litigation, Taft's general standard was never explicitly approved or embraced by any of the Justices of the United States Supreme Court during these years.<sup>365</sup> Instead, Supreme Court debate centered chiefly around the well-known alternative formulations advocated by Justice Rufus Peckham on the one hand, and Justice Edward Douglass White on the other. While the "every direct restraint" standard advocated by Justice Peckham prevailed initially,<sup>366</sup> increasing judicial doubts regarding this test were apparent by 1904,<sup>367</sup> and Justice White's alternative interpretation banning only "unreasonable restraints of trade" finally triumphed in the Court's 1911 opinion in *Standard Oil Co. v. United States*.<sup>368</sup> In their early formulations, these two standards were invoked to support differing practical results.<sup>369</sup> As ultimately explained and defended over time, however, these standards became increasingly similar in the patterns of condemnation and approval they produced, and at least arguably seemed to evolve in the direction of Taft's ancillary/nonancillary methodology.<sup>370</sup>

In their respective approaches to antitrust analysis, Judge Taft and Justice Peckham adhered to traditional political and economic theory somewhat more firmly than did Justice White, who sometimes strayed significantly from classical reasoning and assumptions. The approaches of all three jurists displayed an essential commonality, however, for all three jurists still sought to distinguish harmful from beneficial activity within a largely traditionalist frame of reference centrally concerned with individual rights and the proper "nondiscretionary" delineation of state and federal power.

364. See, e.g., R. BORK, *supra* note 6, at 26 (Taft's opinion "must rank as one of the greatest, if not the greatest, antitrust opinions in the history of the law."); Arthur, *Farewell*, *supra* note 12, at 271-72; Carstensen, *The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the 'Rule of Reason' in Restraint of Trade Analysis*, 2 INST. LEG. STUD. WORKING PAPERS Vol. 6, 87-89 (1987); Kauper, *The Sullivan Approach to Horizontal Restraints*, 75 CALIF. L. REV. 893, 893 (1987). For a description of Taft's approach, see *infra* text accompanying notes 460-71.

365. But see H. THORELLI, *supra* note 1, at 470 (arguing that in not objecting to Taft's analysis when *Addyston Pipe* came before the Supreme Court itself, Justice Peckham implicitly approved that analysis).

366. See, e.g., *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

367. See *Northern Sec. Co. v. United States*, 193 U.S. 197, 360-64 (1904) (Brewer, J., concurring) (declaring that, contrary to his prior belief, the test should be whether trade was restrained unreasonably).

368. 221 U.S. 1 (1911).

369. Justice White, for example, would have upheld the agreements struck down by Justice Peckham, for the majority, in *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898), and *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

370. As time went on Justice Peckham clearly explained that classic reasonably ancillary arrangements did not come within the scope of the "every direct restraint" test. See, e.g., *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 567-68 (1898). In articulating the meaning of the "rule of reason" in *Standard Oil*, Chief Justice White stressed as fundamental issues the inherent nature and effects and the purpose of any challenged agreement in such a way that the rule of reason could be understood to be rather similar to Judge Taft's reasonably ancillary/nonancillary test, see *Standard Oil*, 221 U.S. at 58, although the opinion's ambiguous language was open to a variety of interpretations. See also *United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911). Chief Justice White asserted in *Standard Oil* that the rule of reason as announced in 1911 was essentially equivalent to the earlier direct/indirect restraints test. See *Standard Oil*, 221 U.S. at 66. Taft himself found the *Standard Oil* opinion to be in accord with his own view of common law restraint of trade analysis and principles. See W. TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* 89-96 (1914) [hereinafter W. TAFT, *THE ANTI-TRUST ACT*].

In numerous off-the-court speeches, William Howard Taft explained that economic life had progressively developed in human history<sup>371</sup> on the basis of natural law<sup>372</sup> through an increasing recognition of the fundamentality and interconnectedness of property rights and individual liberty.<sup>373</sup> Taft's antitrust views evolved as an application of this more general theoretical perspective. In his 1914 book, *The Anti-Trust Act and the Supreme Court*,<sup>374</sup> Taft characterized the Sherman Act as an important safeguard for basic economic rights and political freedom and heavily stressed that recent Sherman Act jurisprudence had developed within the larger context of judicial concerns and methodology embodied in contemporary constitutional adjudication. The Sherman Act, Taft declared, "qualified three important phases of what we include in the general term 'individual liberty'—the right of property, freedom to contract, and freedom of labor."<sup>375</sup> The Act, he noted, had attacked various methods of "suppressing competition and controlling prices" which "had resulted in the building of great and powerful corporations which had, many of them, intervened in politics and through use of corrupt machines and bosses threatened us with a plutocracy."<sup>376</sup>

After an extended discussion of the common law of restraints of trade in his first chapter,<sup>377</sup> Taft proceeded to explain the fundamental analytical and institutional setting of restraint of trade and antitrust jurisprudence in his second chapter. The chapter appropriately was entitled: *General Function of Constitution and Courts in Protection and Limitation of Individual Rights of Property, Contract, and Labor*.<sup>378</sup> In this chapter, Taft forcefully recapitulated the core ideas of nineteenth century political liberalism and classical economic theory as the essential frame of reference for antitrust analysis. He declared, for example, that

the benefit of society as a whole is only consistent with the full opportunity of its members to pursue happiness and their individual liberty. This, in its broadest and proper sense, includes freedom from personal restraint, right of free labor, right of property, right of religious worship, right of contract.<sup>379</sup>

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371. See Solvick, *The Pre-Presidential Political and Economic Thought of William Howard Taft*, 43 NW. OHIO Q. 87 (1971).

372. See, e.g., W. TAFT, *FOUR ASPECTS OF CIVIC DUTY* 11-12 (1906) [hereinafter W. TAFT, *CIVIC DUTY*].

373. For example, in 1906 he noted that:

The right of property has played quite as important a part in the development of the human race as the right of personal liberty. Indeed the two rights are so associated in the struggle which man has had to make in taking himself out of the lower animals and lifting himself to his present material and spiritual elevation that it is hard to separate them in an historical discussion.

Address by W. Taft, Tuskegee Institute, Tuskegee, Alabama (Apr. 4, 1906) (William Howard Taft Papers, Manuscript Division, Library of Congress) (quoted in Solvick, *supra* note 371, at 87). Elsewhere, Taft described the basis of the fundamental right to property and its historic origin, explaining that when man "began to live in a social state with his fellows, he recognized, dimly at first but subsequently with greater clearness, that the laborer should have and enjoy that which his labor produced." W. TAFT, *CIVIC DUTY*, *supra* note 372, at 15-16.

374. W. TAFT, *THE ANTI-TRUST ACT*, *supra* note 370.

375. *Id.* at 2-3.

376. *Id.* at 4. See also *id.* at 33.

377. See *id.* at 6-26.

378. *Id.* at 27.

379. *Id.* at 37.

Emphasizing the nondiscretionary nature of United States Supreme Court jurisprudence,<sup>380</sup> Taft praised the Court's recent interpretation of the fourteenth amendment rights of labor, property, contract, and personal freedom.<sup>381</sup> Noting particularly the Court's opinion in *Holden v. Hardy*<sup>382</sup> upholding a maximum hours law for miners, Taft declared:

This shows the state of mind and the view of its duty in which the Supreme Court has approached the construction of the anti-trust law and the recognition that it has given to the fact that under the changes of business and social conditions limitations of the Constitution affecting the right of property, the right of free contract, and the right of free labor may be qualified in a limited way without a breach of individual liberty and without removing or disregarding the fundamental ancient landmarks set by the Constitution of the United States. It is not that the court varies or amends the Constitution or a statute, but that, there being possible several interpretations of its language, the court adopts that which conforms to prevailing morality and predominant public opinion.<sup>383</sup>

The basic rights of labor, property, and contract were no less fundamental concerns in the jurisprudence of Justices Peckham<sup>384</sup> and White.<sup>385</sup> Justice Peckham, indeed, presented almost the ideal type of an "old conservative"<sup>386</sup> profoundly alarmed by the contemporary expansion of both governmental activity and industrial combination.<sup>387</sup> No one on the New York Court of Appeals or on the United States Supreme Court exceeded his vigor in proclaiming and applying the tenets of laissez-faire constitutionalism in such cases as *Allgeyer v. Louisiana*<sup>388</sup> and *Lochner v. New York*,<sup>389</sup> or in his much cited, extended dissent in the unreported New York case of *People ex rel. Annan v. Walsh*,<sup>390</sup> subsequently published in connection with the later, better known case of *People v. Budd*.<sup>391</sup> In that dissent, for example, Judge Peckham sharply attacked state rate regulation of companies that had not received any special governmental privileges<sup>392</sup> and strongly criticized the United States Supreme Court's 1877 opinion in *Munn*.<sup>393</sup> Exhibiting a philosophical embrace of rugged individualism and equal opportunity,<sup>394</sup> Judge Peckham condemned the *Munn* Court

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380. *Id.* at 42.

381. *See id.* at 42-43.

382. 169 U.S. 366 (1898).

383. W. TAFT, *THE ANTI-TRUST ACT*, *supra* note 370, at 47.

384. *See generally* Duker, *Mr. Justice Rufus W. Peckham: The Police Power and the Individual in a Changing World*, 1980 B.Y.U. L. REV. 47.

385. *See generally* R. HIGSAW, *EDWARD DOUGLASS WHITE: DEFENDER OF THE CONSERVATIVE FAITH* (1981).

386. *See* Horwitz, *Progressive Legal Historiography*, *supra* note 52, at 685 (describing Justice Peckham's approach to Sherman Act analysis in these terms).

387. *See* Duker, *supra* note 384, at 47, 50, 59.

388. 165 U.S. 578 (1897).

389. 198 U.S. 45 (1905).

390. 22 N.E. 682 (1889).

391. 117 N.Y. 1, 34-71, 22 N.E. 670, 682-95 (1889) (Peckham, J., dissenting). Judge Gray dissented along with Judge Peckham in *Budd*. In doing so, he specifically referred to, and concurred in Judge Peckham's *Walsh* dissent, and Judge Peckham's opinion from that earlier case was published in the New York Reports following Judge Gray's opinion. *See id.* at 34-71, 22 N.E. at 682-95.

392. *Id.* at 39-43, 66-67, 22 N.E. at 684-85, 693 (Peckham, J., dissenting).

393. *Munn v. Illinois*, 94 U.S. 113 (1877). *See supra* text accompanying notes 25-27.

394. *See* Duker, *supra* note 384, at 50.

for invoking the old, paternalistic views of Lord Hale<sup>395</sup> and for ignoring "the later and, as I firmly believe, the more correct ideas which an increase of civilization and a fuller knowledge of the fundamental laws of political economy, and a truer conception of the proper functions of government have given us at the present day."<sup>396</sup>

Justice Peckham's antitrust opinions reflected his complementary antipathy to nongovernmental threats to individual liberty and property. His comments on the opportunities and independence of small businesses in *United States v. Trans-Missouri Freight Association*<sup>397</sup> were not an analytical "slip"<sup>398</sup> but an expression of ideas that were central to his embrace of laissez-faire constitutionalism. Justice Peckham echoed much wider currents of traditional economic thought<sup>399</sup> when he expressed his great concern for "small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein,"<sup>400</sup> and his alarm at the transformation of "an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation."<sup>401</sup> Justice Peckham believed that contemporary economic impropriety threatened not only individual freedom and opportunity, but also the property and exchange rights of others, and did not see railroad cartelization as lawful, self-protective activity, even at a time of assertedly ruinous competition.<sup>402</sup>

Justice White viewed the railroad companies' activity much more sympathetically. In his well-known dissent in *Trans-Missouri Freight Association*,<sup>403</sup> he expressed approval of the defendants' cooperative rate-setting efforts<sup>404</sup> and strongly disagreed with Justice Peckham's articulated antitrust standard. He warned that Justice Peckham's approach posed a severe danger to both freedom of contract

395. *Budd*, 117 N.Y. at 44-48, 22 N.E. at 686-87 (Peckham, J., dissenting).

396. *Id.* at 47, 22 N.E. at 687 (Peckham, J., dissenting).

397. 166 U.S. 290 (1897).

398. See R. BORK, *supra* note 6, at 25 (so describing Justice Peckham's invocation of these concerns).

399. See *supra* text accompanying notes 86-153.

400. *Trans-Missouri Freight Ass'n*, 166 U.S. at 324.

401. *Id.*

402. See, e.g., *id.* at 339 (rejecting a claim that collective price fixing was simply an extension of each company's individual right to charge reasonable rates, declaring, "Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play"); *id.* at 331-35, 339-42. Like Senator Sherman, see *supra* notes 297, 319 and accompanying text, Justice Peckham believed that the establishment of anticompetitive combinations differed fundamentally from normal economic development, even though he conceded that the latter sometimes caused similar social dislocations as "the necessary accompaniment of all great industrial changes." *Trans-Missouri Freight Ass'n*, 166 U.S. at 323. He explained:

It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article.

*Id.* at 323-24.

403. *Id.* at 343-74 (White, J., dissenting).

404. *Id.* at 371 (White, J., dissenting) (declaring the defendant railroads' agreement to be consistent with the policy of the Interstate Commerce Act, and therefore of the Sherman Act as well, because it "simply provides for uniform classification, and seeks to prevent secret or sudden changes in the published rates").

and the contemporary ideal of nondiscretionary adjudication and that it consequently threatened to defeat the purpose of federal antitrust legislation. He explained:

The plain intention of the law was to protect the liberty of contract and the freedom of trade. Will this intention not be frustrated by a construction which, if it does not destroy, at least gravely impairs, both the liberty of the individual to contract and the freedom of trade? If the rule of reason no longer determines the right of the individual to contract or secures the validity of contracts upon which trade depends and results, what becomes of the liberty of the citizen or of the freedom of trade? Secured no longer by the law of reason, all these rights become subject, when questioned, to the mere caprice of judicial authority. Thus, a law in favor of freedom of contract, it seems to me, is so interpreted as to gravely impair that freedom.<sup>405</sup>

Justice Peckham's majority opinion the next year in the case of *United States v. Joint Traffic Association*<sup>406</sup> largely addressed such freedom of contract concerns. Reiterating that freedom of contract was not absolute, Justice Peckham stressed that the question before the Court was only one of Congress' interstate commerce power, and not one of policy.<sup>407</sup> He concluded that Congress had ample power to regulate the defendants' anticompetitive activity:

We do not think, when the grantees of this public franchise are competing railroads seeking the business of transportation of men and goods from one State to another, that ordinary freedom of contract in the use and management of their property requires the right to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition.<sup>408</sup>

Freedom of contract and other individual rights repeatedly were addressed as important issues in later formative era federal antitrust cases as well.<sup>409</sup> Justice John Marshall Harlan, for example, forcefully reasserted these fundamentals when he restated established antitrust principles in the 1904 case of *Northern Securities Co. v. United States*.<sup>410</sup> In condemning a holding company established to combine two competing railroads, Justice Harlan noted the diversity of contemporary American reactions to economic change. Yet, he strongly affirmed traditional principles as a matter of congressional intent, even while simultaneously disclaiming any policy discretion or preference on the part of the Court itself. He noted:

Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and

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405. *Id.* at 355 (White, J., dissenting).

406. 171 U.S. 505 (1898).

407. *See id.* at 573.

408. *Id.* at 570-71.

409. *See, e.g., Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 229 (1899), Justice Peckham, for the Court, declaring:

We cannot so enlarge the scope of the language of the Constitution regarding the liberty of the citizen as to hold that it includes or that it was intended to include a right to make a contract which in fact restrained and regulated interstate commerce, notwithstanding Congress, proceeding under the constitutional provision giving to it the power to regulate that commerce, had prohibited such contracts.

410. 193 U.S. 197 (1904).

prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.<sup>411</sup>

Seven years later, Chief Justice White again stressed the centrality of basic economic rights in the Court's seminal "rule of reason" opinions in *Standard Oil Co. v. United States*<sup>412</sup> and *United States v. American Tobacco Co.*<sup>413</sup> Echoing fears he earlier had expressed with regard to redistributive government regulation of the mere extent of individual property holding,<sup>414</sup> Chief Justice White emphasized that both the common law and the Sherman Act fundamentally were premised on the need to respect both property rights and the proper exercise of freedom of contract. In reviewing the common law in his *Standard Oil* opinion, for example, he noted:

It is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual. This would seem to manifest, either consciously or intuitively, a profound conception as to the inevitable operation of economic forces and the equipoise or balance in favor of the protection of the rights of individuals which resulted. . . . [P]rohibitions as to individuals were directed, not against the creation of monopoly, but were only applied to such acts in relation to particular subjects as to which it was deemed, if not restrained, some of the consequences of monopoly might result. After all, this was but an instinctive recognition of the truisms that the course of trade could not be made free by

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411. *Id.* at 337–38. Justice Holmes' well-known dissent in *Northern Securities* expressed pointed doubts regarding the virtues of universal competition. Justice Holmes feared that the majority's condemnation of the challenged holding company might call into question the legality of productive, tight combinations in general, down to the level of two-person partnerships among former rivals. *See id.* at 410–11 (Holmes, J., dissenting). He declared his firm support for the Court's earlier opinions in *Trans-Missouri Freight Ass'n* and *Joint Traffic Ass'n*, *see Northern Sec.*, 193 U.S. at 405 (Holmes, J., dissenting), but distinguished those cartel cases from cases involving the potentially productive "fusion" of former competitors, *id.* at 410 (Holmes, J., dissenting), declaring his antipathy to "an interpretation of the law which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms." *Id.* at 411 (Holmes, J., dissenting). Justices Harlan and Holmes differed in the case in large measure because the former Justice viewed the holding company as essentially a loose arrangement, while Justice Holmes saw it as a form of tight combination. *See R. BORK, supra* note 6, at 30–32. It should also be stressed, however, that in general, Justice Holmes' views on competition, as on many other contemporary issues, tended to be substantially less traditional than did the views of his colleagues on the bench, as Justice Holmes readily conceded, for example, in his dissent in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 409–13 (1911) (Holmes, J., dissenting). *See id.* at 411–12 (Holmes, J., dissenting) ("I confess that I am in a minority as to larger issues than are concerned here. I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article . . . as fixing a fair price."'). For a discussion of Holmes' views on competition prior to the time he became a Justice of the United States Supreme Court, *see supra* note 107.

412. 221 U.S. 1 (1911).

413. 221 U.S. 106 (1911).

414. *See Northern Sec.*, 193 U.S. at 364–400 (White, J., dissenting). Therein, Justice White declared that governmental power

to reasonably control the use of property, affords no foundation for the proposition that there exists in government a power to limit the quantity and character of property which may be acquired and owned. The difference between the two is that which exists between a free and constitutional government restrained by law and an absolute government unrestrained by any of the principles which are necessary for the perpetuation of society and the protection of life, liberty and property.

*Id.* at 399 (White, J., dissenting).

obstructing it, and that an individual's right to trade could not be protected by destroying such right.<sup>415</sup>

At a later point in the same opinion, the new Chief Justice<sup>416</sup> even more strongly reiterated the traditional perspectives that earlier had been invoked in the 1890 Senate colloquy on skill-based preeminence.<sup>417</sup> Expressing a similar perception of the sources of concentrated market power, he declared that by omitting any ban on "monopoly in the concrete," the Sherman Act

indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words that freedom to contract was the essence of freedom from undue restraint on the right to contract.<sup>418</sup>

Subsequently, in *American Tobacco*, Chief Justice White returned to these themes and declared that the "rule of reason" approach to Sherman Act interpretation was essential "to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve."<sup>419</sup>

As previously noted, while Justice Peckham and Justice White shared a common preoccupation with economic rights and a common commitment to the ideal of nondiscretionary adjudication, they disagreed on the appropriate method for distinguishing lawful, rights-based activity from troublesome conduct subject to public regulation. Justice Peckham sought to separate legitimate, normal economic efforts from illegitimate behavior through a process of binary classification. Forswearing the more flexible, and thus arguably more discretionary, approach urged by Justice White, Justice Peckham declared that the Sherman Act banned *every* "restraint of trade."<sup>420</sup> If an agreement was of a type falling within that prohibited category, the agreement was banned. If it was not, the agreement was permitted. When it appeared that this initial formulation might be unduly rigid, and might fail to satisfactorily distinguish harmful from economically beneficial conduct, or the sphere of federal interstate commerce power from the realm of state jurisdiction, Justice Peckham did not turn to a balancing test weighing economic harms and benefits. Instead, he turned to a categorical division between restraints that were of a direct type and those that were of an indirect variety.<sup>421</sup>

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415. *Standard Oil*, 221 U.S. at 55–56.

416. White became Chief Justice of the United States Supreme Court in 1910. See R. HIGGS, *supra* note 385, at 59.

417. See *supra* text accompanying notes 301–10.

418. *Standard Oil*, 221 U.S. at 62.

419. *American Tobacco*, 221 U.S. at 180.

420. See *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 328 (1897).

421. See, e.g., *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 568 (1898).

While Justice White was equally concerned to protect the realm of private right from governmental encroachment and desired to distinguish rightful from illegitimate conduct no less strongly than did Justice Peckham, he believed that Peckham's standard was overly restrictive and unduly rigid. As an alternative, Justice White advocated a less structured judicial determination of the "reasonableness" of private action<sup>422</sup> echoing the "nondiscretionary" review of the "reasonableness" of governmental action that was at the heart of laissez-faire constitutionalism.<sup>423</sup>

Over time, Justice Peckham did increasingly consider the actual economic impact of particular restraints, even while retaining a categorization approach and a strong commitment to marketplace competition.<sup>424</sup> Simultaneously, Justice White implicitly moved toward a similar classification of permissible and impermissible restraints according to type and purpose even while retaining a "reasonableness" articulation,<sup>425</sup> despite his initially greater,<sup>426</sup> and to some extent continuing,<sup>427</sup> sympathy for collusive efforts to protect property from the hazards of uninhibited competition. In the course of such changes, both Justice Peckham's "every direct restraint" approach and Justice White's "reasonableness" test retained considerable ambiguity. Both, however, increasingly seemed to exhibit significantly greater concern for distinctions between reasonably ancillary agreements and anticompetitive, nonancillary arrangements of the kind that Taft had highlighted.<sup>428</sup> Indeed, in practice, the Supreme Court appears to have quite consistently followed the general lines indicated by Taft's analysis, summarily condemning agreements perceived as merely naked, nonancillary restraints, but repeatedly examining the possible merits of restraints believed to be ancillary to some other beneficial main purpose.<sup>429</sup>

When the Supreme Court in 1911 applied the rule of reason to condemn the specific conduct challenged in *Standard Oil* and *American Tobacco*, however, it did not employ an ancillary/nonancillary articulation. Instead, Chief Justice White, for the Court, explained the illegality of the defendants' activities largely through a more direct application of the core concerns of traditional theory. Pursuing the common contemporary effort to isolate and eliminate artificial interference with the natural, rights-based economic order, Chief Justice White stressed most fundamentally in *Standard Oil* the defendants' apparent

purpose to maintain the dominancy over the oil industry, not as a result of *normal* methods of industrial development, but by *new* means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had *normal* methods

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422. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Trans-Missouri Freight Ass'n*, 166 U.S. at 343-74 (White, J., dissenting).

423. See *supra* text accompanying notes 57-66. On additional aspects of the doctrinal debate between Justices Peckham and White, see *infra* text accompanying notes 952-66.

424. See, e.g., *Joint Traffic Ass'n*, 171 U.S. at 560-65, 567-68.

425. See *Standard Oil*, 221 U.S. at 58.

426. See *Trans-Missouri Freight Ass'n*, 166 U.S. at 361-73 (White, J., dissenting).

427. See, e.g., *American Tobacco*, 221 U.S. at 177 (White, C.J., criticizing the government's view of Sherman Act interpretation partly because it would condemn "a reasonable and just agreement made for the purpose of ending a trade war").

428. See *supra* note 370.

429. See Carstensen, *supra* note 364, at 73-83.



been followed, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.<sup>430</sup>

Both congressional and judicial analyses of early federal antitrust issues thus strongly reflected the same core perspectives of political liberalism and classical economics that simultaneously played a fundamental role in contemporary laissez-faire constitutionalism. The intellectual origins of early antitrust reasoning, and the interrelationship between antitrust and constitutional theory, become even more clearly and fully apparent, however, if attention is focused not only on federal developments but also on contemporaneous state activity as well. It is to this highly illuminating additional context that this Article now turns.

#### V. STATE JURISPRUDENCE AS A SOURCE OF ILLUMINATION

Scholarly writing on formative era antitrust history has long been preoccupied with early federal developments,<sup>431</sup> reflecting the later twentieth century preeminence of federal law in the antitrust field.<sup>432</sup> As an earlier article stressed, however, particular states became very active centers of state antitrust legislation and adjudication during the Progressive Era and mounted major antitrust challenges to some of the most powerful interstate combinations of the time.<sup>433</sup> These active states won major victories, repeatedly obtaining decrees of corporate ouster<sup>434</sup> and collecting fines within individual state jurisdictions equal to or in excess of the aggregate amount of fines collected in all federal antitrust cases in the same period.<sup>435</sup> State restraint of trade law also became the foundation for a dramatically increased volume of private litigation during the same years.<sup>436</sup> Moreover, at least in "active" jurisdictions, state as well as federal antitrust law played an enormously important symbolic role for Progressive Era Americans. Americans followed particular state antitrust developments with tremendous interest,<sup>437</sup> believing that the success or failure of state as well as federal antitrust efforts likely would have profound consequences for the political, moral, and economic character of the nation in the years to come.<sup>438</sup>

The remainder of this Article focuses on early state developments partly because of their considerable independent importance, and because they have received so little scholarly attention in the past. Concentration on state activity and ideology is at least equally important, however, because state developments provide considerable new insight into the nature of antitrust activity in general during the Progressive Era.

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430. *Standard Oil*, 221 U.S. at 75 (emphasis added).

431. See, e.g., May, *supra* note 4, at 497-98, 505.

432. See, e.g., *id.* at 498.

433. See *id.* at 497-502.

434. See, e.g., *id.* at 500-01, 510-17.

435. See *id.* at 501-02. Aggregate federal criminal antitrust fines amounted to \$619,965 by the close of 1914, and \$765,822 by the end of 1919. Texas collected over \$1.6 million in a single case, however, and Missouri judges imposed unsuspended fines totalling \$678,000 by the close of 1915. *Id.* at 502.

436. See, e.g., NEW YORK STATE BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE TO STUDY THE NEW YORK ANTITRUST LAWS 4a (1957) [hereinafter NEW YORK STATE BAR]; May, *supra* note 4, at 503.

437. See generally S. PIOTT, THE ANTI-MONOPOLY PERSUASION: POPULAR RESISTANCE TO THE RISE OF BIG BUSINESS IN THE MIDWEST (1985).

438. See, e.g., *infra* text accompanying notes 664-66.

The two states examined here have been selected with this potential for larger illumination in mind. In the late nineteenth and early twentieth centuries, New York and Missouri became leading centers of both laissez-faire constitutionalism and antitrust legislation and adjudication. Progressive Era jurists and scholars often cited<sup>439</sup> the landmark constitutional law decisions of the New York Court of Appeals in such cases as *In re Jacobs*,<sup>440</sup> *People ex rel. Rodgers v. Coler*,<sup>441</sup> and *People v. Marcus*,<sup>442</sup> and of the Missouri Supreme Court in such cases as *State v. Loomis*,<sup>443</sup> *State v. Julow*,<sup>444</sup> *State ex rel. Garth v. Switzler*,<sup>445</sup> *State v. Cantwell*,<sup>446</sup> and *State v. Missouri Tie & Timber Co.*<sup>447</sup> Judges in New York and Missouri not only expressed the principles of laissez-faire constitutionalism in especially striking form, but also invoked these ideas with particular vigor in scrutinizing contemporary legislative innovations, condemning challenged enactments somewhat more frequently than did jurists in general between 1880 and 1918.<sup>448</sup> In the same years, New York and Missouri both became the scene of substantial popular antitrust sentiment, much related legislative activity, unusually active enforcement efforts, and a great deal of antitrust and restraint of trade adjudication.<sup>449</sup>

The simultaneous presence of these constitutional and antitrust law developments provides a valuable opportunity to explore the contemporary interrelationship between constitutional theory and antitrust analysis. The remainder of this Article undertakes such an exploration by focusing on various important aspects of this interrelationship. The exploration begins in Part VI by examining the state common law background to formative era antitrust developments. The Article proceeds in Part VII to discuss the pattern of popular, legislative, and executive antitrust activity in Progressive Era New York and Missouri. Part VIII then examines the development of antitrust jurisprudence in these states in some detail, exploring the strength of judicial support for antitrust policy in a wide array of ancillary and nonancillary contexts.

Following this exploration of early state developments, the Article concludes by offering some final thoughts on the magnitude of the changes in constitutional and antitrust theory that have occurred over the last 100 years and the significance of these changes for modern antitrust practice and analysis.

439. On the contemporary prominence of New York and Missouri decisions, see C. JACOBS, *supra* note 20, at 42, 51, 55, 69; Pound, *supra* note 20; Urofsky, *supra* note 22.

440. 98 N.Y. 98 (1885) (striking down a statute barring cigar manufacturing in tenements in certain circumstances).

441. 166 N.Y. 1, 59 N.E. 716 (1901) (invalidating a measure regulating hours and wages in municipal contracts).

442. 185 N.Y. 257, 77 N.E. 1073 (1906) (striking down a statute banning the use of "yellow dog contracts").

443. 115 Mo. 307, 22 S.W. 350 (1893) (condemning a Missouri "scrip law" regulating manufacturing and mining wage payments as unequal class legislation).

444. 129 Mo. 163, 31 S.W. 781 (1895) (striking down a ban on "yellow dog contracts").

445. 143 Mo. 287, 45 S.W. 245 (1898). See *supra* text accompanying notes 192-93.

446. 179 Mo. 245, 78 S.W. 569 (1904) (approving a maximum hours law for miners), *aff'd*, 199 U.S. 602 (1905).

447. 181 Mo. 536, 80 S.W. 933 (1904) (striking down a general "scrip law" regulating wage payments).

448. See, for example, the overviews of contemporary state court decisions in Pound, *supra* note 20; Urofsky, *supra* note 22. The pattern in both states was always a mixed one, however. See, for example, the Missouri case of *State v. Cantwell*, *supra* note 446, approving a maximum hours law for miners, and the New York case of *People v. Lochner*, 177 N.Y. 145, 69 N.E. 373 (1904), *rev'd sub nom. Lochner v. New York*, 198 U.S. 45 (1905) (approving the maximum hours law for bakers that was subsequently struck down by the United States Supreme Court).

449. See *infra* text accompanying notes 609-66.

## VI. STATE COMMON LAW BEFORE THE SHERMAN ACT

Nineteenth century American common law on contracts, combinations, and conspiracies in restraint of trade formed an important point of reference for legislators and judges seeking to resolve emerging problems of economic collusion, predation, and concentration during the Populist and Progressive Eras. Indeed, scholars often have argued that Congress largely intended to embrace common law doctrines when it passed the Sherman Antitrust Act<sup>450</sup> in 1890.<sup>451</sup> Although the United States Supreme Court soon freed Sherman Act jurisprudence to follow an independent path by declaring that the statute was intended to go beyond common law doctrine,<sup>452</sup> the English and American common law heritage remained an important point of reference throughout the formative period of Sherman Act jurisprudence.<sup>453</sup> Similarly, late nineteenth and early twentieth century state legislators relied on this same source in formulating their own antitrust statutes,<sup>454</sup> and state courts often looked to such precedent as an important source of guidance in developing early state antitrust jurisprudence.

Historians and legal scholars, however, continue to present somewhat differing pictures of nineteenth century American common law on restraints of trade,<sup>455</sup> debating, for example, the frequency with which American courts adopted a "reasonableness" test for "nonancillary" restraints instead of condemning such restraints per se.<sup>456</sup> Much of the debate has focused on the accuracy<sup>457</sup> or inaccuracy<sup>458</sup> of Judge William Howard Taft's classic 1898 restatement of common law principles in *United States v. Addyston Pipe & Steel Co.*,<sup>459</sup> and it is instructive to keep that opinion in mind in exploring the state of pre-Sherman Act case law in New York and Missouri.

This exploration of state jurisprudence usefully contributes to a better under-

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450. Sherman Antitrust Act, ch. 647, §§ 1-8, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

451. See, e.g., W. LETWIN, *supra* note 167, at 95-96; H. THORELLI, *supra* note 1, at 228. On the possible inferences to be drawn from congressional invocation of common law terminology in the Sherman Act, see *supra* note 269.

452. See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 328 (1897).

453. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1, 51-58 (1911); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899).

454. See, e.g., *In re Davies*, 168 N.Y. 89, 61 N.E. 118 (1901) (declaring New York antitrust statute, the Donnelly Act, to be essentially a codification of common law).

455. See generally, e.g., E. KINTNER, *supra* note 15, at §§ 3.3-3.10; W. LETWIN, *supra* note 167, at 77-81; M. SKLAR, *supra* note 1, at 93-105; H. THORELLI, *supra* note 1, at 36-48; Arthur, *Farewell*, *supra* note 12, at 280-84; Hovenkamp, *Labor Conspiracies*, *supra* note 107, at 935-38.

456. Compare, e.g., E. KINTNER, *supra* note 15, § 3.3, at 85 ("the great weight of authority recognizes that the Rule of Reason was limited in its application to ancillary restraints") (footnotes omitted); *id.* § 3.3, at 87 (noting that majority of courts held nonancillary restraints void without considering their reasonableness); with M. SKLAR, *supra* note 1, at 98 (declaring that "[b]y the early 1890s" the test of reasonableness was "the general rule of common law with respect to restraint of trade"); *id.* at 93-101 (expanding on this proposition). Despite disagreement on the frequency with which this standard of review was invoked by 1890, otherwise differing scholars have stressed that nineteenth century courts condemned the substantial majority of challenged nonancillary restraints, even if adoption of a reasonableness standard by some courts allowed approval of nonancillary restraints in a minority of instances. See, e.g., M. SKLAR, *supra* note 1, at 99; H. THORELLI, *supra* note 1, at 40.

457. See E. KINTNER, *supra* note 15, at 87-88; H. THORELLI, *supra* note 1, at 469; Arthur, *Farewell*, *supra* note 12, at 280-84.

458. See, e.g., R. BORK, *supra* note 6, at 27 (declaring that Taft's opinion "was not the restatement it pretended to be so much as a new structure").

459. 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899).

standing of late nineteenth and early twentieth century legal thought in general. First, it makes somewhat clearer the extent to which Taft's doctrinal approach was either expressly articulated or operative in fact in various areas of the country by the time the Sherman Act was passed. Simultaneously, examination of the pre-1890 New York and Missouri cases provides an essential point of comparison for subsequent antitrust developments in these two jurisdictions and clarifies a significant source of influence on those later antitrust analyses.

#### A. *The Addyston Pipe Restatement*

In his famous opinion in *Addyston Pipe*, condemning a major interstate bid-rigging conspiracy as a Sherman Act violation, Judge Taft acknowledged that courts had sometimes upheld and sometimes invalidated private restraints upon business rivalry.<sup>460</sup> But in the majority of nineteenth century cases, Taft declared, there was a consistent pattern. No restraint was enforceable unless "merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."<sup>461</sup> Thus, for example, where litigation involved a beneficial, productive main purpose such as an ordinary sale of a business along with its developed good will, courts upheld a reasonably limited ancillary covenant by the seller not to compete with the buyer of that business.<sup>462</sup> In such cases, the main purpose would indicate the degree of protection needed to safeguard the benefit of the buyer's bargain and provide "a sufficiently uniform standard" by which to judge such a restraint.<sup>463</sup> If the restraint was broader than reasonably necessary to fulfill the contract's legitimate main purpose, it was void because it would needlessly oppress the covenantor and tend to a monopoly.<sup>464</sup> Moreover, if the individual ancillary covenant not to compete that was connected with a particular contract was part of a larger scheme intended to obtain all the property in a line of business, with an eye to establishing a monopoly, the restraint also would be void.<sup>465</sup> Under these circumstances, the restraint of competition would no longer be ancillary but itself would be the main purpose of the contract, and would be treated in the same way as other "*non-ancillary*" restraints.<sup>466</sup>

In Taft's view, restraints on competition falling within this latter category of nonancillary agreements were unlawful per se. When the sole object of an agreement was to reduce competition or raise prices, no beneficial main purpose existed to justify the agreement, and it would be void as necessarily tending to monopoly.<sup>467</sup> In such a case, there could be no measure of needed protection to the parties except the

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460. See *Addyston Pipe*, 85 F. at 280-93.

461. *Id.* at 282.

462. See *id.* at 281-82.

463. *Id.* at 282.

464. *Id.*

465. *Id.* at 291.

466. *Id.*

467. *Id.* at 282.

“vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition.”<sup>468</sup> When a nonancillary restraint was challenged, it was no defense that the parties might have faced “ruinous” competition, had a small market share, or set only “reasonable” prices.<sup>469</sup>

Taft acknowledged that in some English and American cases courts had departed from these standards of analysis and erroneously “set sail on a sea of doubt,” attempting to judge nonancillary restraints according to the judges’ own subjective notions of what degree of restraint of competition was in the public interest.<sup>470</sup> He found these opinions, however, to be both wrong as a matter of policy and to be contradicted by other leading cases.<sup>471</sup>

Given the emphasis that antitrust scholars and historians have placed on the *Addyston Pipe* opinion,<sup>472</sup> it is important to ask how closely Taft’s restatement paralleled the actual experience and end result of common law adjudication within particular jurisdictions by the closing years of the nineteenth century. Did state court judges clearly perceive basic economic differences between “ancillary” and “nonancillary” arrangements and consistently treat them differently? How uniformly did state jurists approve ancillary restraints or condemn nonancillary agreements, and to what extent did they employ a “reasonableness” test or a per se standard in reaching their decisions? What specific benefits or harms did nineteenth century judges perceive in various challenged arrangements, and how, if at all, did their perceptions change over time?

#### B. *The Common Law in New York and Missouri*

In the cases decided prior to the July 2, 1890, enactment of the Sherman Antitrust Act, New York and Missouri judges consistently did uphold ancillary restraints and indeed significantly expanded the protection granted such arrangements as time went on. Simultaneously, New York and Missouri judges repeatedly condemned nonancillary restrictions during most of the nineteenth century, although Missouri judges addressed such arrangements much less frequently than did jurists in New York. Only very rarely, however, did these judges ever expressly articulate any basic doctrinal distinction along the lines stressed by Taft.<sup>473</sup> At times, moreover, they invoked certain general legal tests without regard to the type of restraint at issue and without any apparent recognition of the potentially differing concerns posed by ancillary and nonancillary agreements.

The reported opinions grew appreciably in length in the late 1870s and 1880s. In these later opinions, state judges sought to explain more fully the principles of

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468. *Id.* at 283.

469. *See id.* at 291.

470. *Id.* at 283–84.

471. *See id.* at 283–87.

472. *See supra* note 364.

473. *See Chappel v. Brockway*, 21 Wend. 157 (N.Y. Sup. Ct. 1839); *Diamond Match Co. v. Roeber*, 106 N.Y. 473, 13 N.E. 419 (1887).

private restraint of trade analysis at the same time that, at least in New York, they also were expanding their articulated analyses of constitutional issues and contributing substantially to the contemporaneous rise of laissez-faire constitutionalism.<sup>474</sup> These expanded late nineteenth century restraint of trade opinions in New York and Missouri embodied a decidedly mixed view of both the merits of economic competition and the claimed dangers from private restraints, however, and they left common law analysis in these jurisdictions in a heightened rather than lessened state of confusion by the summer of 1890.

### 1. *The Virtues of Ancillary Agreements and Vertical Restraints*

As Taft's restatement indicated, by the late nineteenth century, reasonably ancillary restraints had long been accepted as a legitimate and beneficial part of the free market economy.<sup>475</sup> Enforcement of a seller's ancillary covenant not to compete ensured that buyers would be willing to pay full value for a business' established "good will"—its developed reputation and customer base—without fear that the acquired good will later would be dissipated by the seller's renewed business efforts in the area. As a result, business owners ostensibly had an incentive to make the business more effective and successful in order to enhance the value of the business' good will.<sup>476</sup> Conversely, validation of ancillary restrictions on a buyer's use of particular purchased property in competition with the seller was deemed necessary to encourage free purchase and sale of property, and was not thought to be anticompetitive because it only provided a seller with security against the rise of new competition of the seller's own making.<sup>477</sup> For similar reasons, ancillary restrictions on a partner's activities in competition with the partnership itself were thought legitimate because they better ensured the viability of a joint enterprise "useful to the community."<sup>478</sup> Finally, enforcement of agreements ancillary to an employment contract, restricting the employee's competitive efforts after leaving the firm, were deemed justified because they allowed firms to more freely hire the best assistants and fully instruct them in a way that might be inhibited if the employee could not be legally stopped from subsequently using acquired trade secrets in rivalry with the business.<sup>479</sup>

As previously noted, New York and Missouri judges only rarely articulated separate legal tests or standards to be used for ancillary as opposed to nonancillary arrangements;<sup>480</sup> nor did they maintain any consistent or clear distinctions in references to "contracts" and "combinations" in restraint of trade, terminology sometimes said to have corresponded with ancillary and nonancillary restraints,

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474. See *supra* text accompanying notes 195–97, 439–42.

475. See, e.g., H. THORELLI, *supra* note 1, at 37.

476. See, e.g., *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899).

477. See *id.* at 280–81.

478. See *id.* at 280.

479. See *id.* at 281.

480. See *supra* text accompanying note 473.

respectively.<sup>481</sup> New York judges, however, did accord ancillary restraints considerably more deference than nonancillary restraints, and almost never found the former void.<sup>482</sup> Until the late 1880s, the New York courts continued to adhere to the test suggested in the leading English case of *Mitchel v. Reynolds*.<sup>483</sup> Under that test, "general" ancillary restraints, defined as those restraints that were unlimited as to their geographic scope within the state<sup>484</sup> or, later, within the nation,<sup>485</sup> were declared void. Less geographically sweeping "partial" restraints, however, were valid, provided there was a good consideration and the restraint was "reasonable and useful" and not "larger than . . . necessary for the protection of the covenantee in the enjoyment of his trade or business."<sup>486</sup>

In the late 1880s, the New York Court of Appeals undertook a revealing reconsideration of the legal treatment of ancillary restraints, in the well-known and much-cited case of *Diamond Match Co. v. Roeber*.<sup>487</sup> The court's opinion further liberalizing the treatment of ancillary restraints was based in large part on the court's understanding of economic change as of 1887. At this time, New York high court judges perceived market opportunities to be generally expanding rather than narrowing and believed that competitive new entry remained a pervasive possibility effectively limiting the likely harm from private restraints. Simultaneously, these judges also harbored a heightened concern for governmental restrictions on private contracting freedom, forcefully expressed, for example, in the New York Court of Appeals' decision in *In re Jacobs*.<sup>488</sup>

In *Diamond Match* a manufacturer and seller of matches had sold its business and good will to plaintiff's assignor, simultaneously agreeing not to engage in the manufacture or sale of friction matches for 99 years anywhere in the United States, except in the state of Nevada and the territory of Montana.<sup>489</sup> When the defendant subsequently violated this agreement by pursuing rival match manufacturing and sales efforts within the prohibited territory, the plaintiff sought and was granted an injunction against such behavior over the defendant's objection that such a sweeping ancillary covenant not to compete was invalid.<sup>490</sup> Without literally overturning it, the court vigorously challenged the validity of the long-held distinction between general and partial ancillary restraints of trade. Judge Charles Andrews, for the court, noted

481. See, e.g., W. LETWIN, *supra* note 167, at 39–52; H. THORELLI, *supra* note 1, at 17, 27.

482. The few contrary examples seem to have involved special circumstances. See, e.g., *Bingham v. Maigne*, 52 N.Y. Super. Ct. (20 J. & S.) 90 (1885) (In a case involving a covenant restricting employee of seller of business from engaging in competitive efforts within 250 miles of New York, the court stressed the importance of the fact that the case involved a restraint of the employee rather than of the original seller.); *Saratoga County Bank v. King*, 44 N.Y. 87 (1870) (parties conceded the agreement to be void as a general restraint of trade).

483. 1 P. Wms. 181, 24 Eng. Rep. 347 (1711).

484. See *Dunlop v. Gregory*, 10 N.Y. 241, 244 (1851); *Chappel v. Brockway*, 21 Wend. 157 (N.Y. Sup. Ct. 1839).

485. See *Diamond Match Co. v. Roeber*, 106 N.Y. 473, 13 N.E. 419 (1887).

486. *Dunlop v. Gregory*, 10 N.Y. 241, 244 (1851). In some nineteenth century restraint of trade cases, however, courts confusingly invoked this "general" and "partial" restraint terminology even where no classic ancillary restraint was involved. See, e.g., *infra* text accompanying notes 515, 598.

487. 106 N.Y. 473, 13 N.E. 419 (1887).

488. 98 N.Y. 98 (1885). See *supra* text accompanying notes 195–97.

489. *Diamond Match*, 106 N.Y. at 477–78, 13 N.E. at 419.

490. *Id.* at 486, 13 N.E. at 423–24.

that criticisms of *general* restraints in many of the leading cases had been mere dicta, and he declared that changed economic conditions since the time the distinction had been established called for a reexamination of its utility.<sup>491</sup> He noted the harms that the court in the 1711 case of *Mitchel v. Reynolds*<sup>492</sup> had thought general restraints posed. That English case had stressed the potential loss of the obligor's livelihood, the community's loss of the obligor's services, and the dangers of reduced competition.<sup>493</sup> Judge Andrews found such perils to be much less serious under modern conditions than they might have been in 1711. What were once local markets had become national and international markets, a vast number of new industries had opened, and business incorporation had been made freely available to everyone wishing to take advantage of it. Because of these changes, he did not believe that "the opportunities for employment and for the exercise of useful talents [are] so shut up and hemmed in that the public is likely to lose a useful member of society" in a case like the one before the court any more than when someone sold a local business with a covenant not to compete locally.<sup>494</sup>

Judge Andrews made note of Chief Justice Tindal's classic test for judging the reasonableness of contracts in *partial* restraint of trade, that is, "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public."<sup>495</sup> But, he declared:

When the restraint is general, but at the same time is co-extensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint co-extensive with the business which he sells?<sup>496</sup>

Judge Andrews did not perceive any significant threat to competition in such an arrangement. No monopoly was created, he declared, because the contract conferred no exclusive privilege to engage in the business.<sup>497</sup> The industry remained wide open to new entrants, and there was "little danger that the public will suffer harm from lack of persons to engage in a profitable industry."<sup>498</sup> If a general restraint was bad when the trade was general, by the same logic, contracts in partial restraint should be deemed similarly objectionable when the trade was local.<sup>499</sup> In Judge Andrews'

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491. *Id.* at 480–81, 13 N.E. at 421.

492. 1 P. Wms. 181, 24 Eng. Rep. 347 (1711).

493. *Diamond Match*, 106 N.Y. at 480–81, 13 N.E. at 421.

494. *See id.* at 482, 13 N.E. at 422.

495. *Id.* at 482, 13 N.E. at 421 (quoting *Horner v. Graves*, 7 Bing. 735, 131 Eng. Rep. 284 (C.P. 1831)).

496. *Id.* at 482, 13 N.E. at 421–22.

497. *See id.* at 483, 13 N.E. at 422. On contemporary understandings of the term "monopoly," see also *supra* text accompanying notes 302–10.

498. *Diamond Match*, 106 N.Y. at 483, 13 N.E. at 422.

499. *See id.*



mind, competition simply was no longer a very pressing concern in ancillary restraint contexts. Indeed, he stated:

We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness *as between the parties*.<sup>500</sup>

In one of the very few contemporary New York allusions to an ancillary/nonancillary distinction in restraint of trade analysis, Judge Andrews did tersely concede that nonancillary restraints might call for a different attention to competition, but here he was equivocal. “Combinations between producers to limit production and to enhance prices,” he declared without further explanation, “are or *may be* unlawful, but they stand on a different footing.”<sup>501</sup>

The invocation of public policy to invalidate a covenant like the one before the court was troubling to Judge Andrews not only because he concluded the alleged dangers were insubstantial. He further believed that such invocation threatened an additional value of vital importance. He cautioned that “what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions.”<sup>502</sup> In short, in 1887, at a time of expanding markets and apparently expansive business opportunity, it was freedom of contract, and not competition, that seemed most vitally at stake when New York judges considered the legality of even a quite far-reaching ancillary restriction.

Noting that recent cases had greatly weakened the doctrine that contracts in general restraint of trade are void regardless of circumstances, Judge Andrews nevertheless conceded that the doctrine had not yet been abrogated.<sup>503</sup> In applying the doctrine, however, national and not state boundaries were the relevant test for judging whether a restraint was general because the activity of manufacturing industries typically extended beyond state boundaries, and Americans owed their civic allegiance to the nation as well as to the state.<sup>504</sup> Accordingly, the covenant before the court was not a contract in general restraint of trade but only a partial restraint because it excepted Nevada and Montana.<sup>505</sup> Moreover, the covenant was supported by a good consideration and was reasonable under the circumstances and therefore valid.<sup>506</sup>

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500. *Id.* (emphasis added).

501. *Id.* (emphasis added).

502. *Id.* at 482, 13 N.E. at 422.

503. *See id.* at 484, 13 N.E. at 423.

504. *See id.* at 485, 13 N.E. at 423.

505. *See id.* at 484, 13 N.E. at 423.

506. *See id.* at 486, 13 N.E. at 423.

Two years later, the New York Supreme Court took the final step that the New York high court had hesitated to take in *Diamond Match* itself, upholding a complaint seeking enforcement of a seller's ancillary covenant not to compete for ten years anywhere in the United States.<sup>507</sup> In so doing, the court made no reference to the specific restraint's potential impact, if any, on competition, and gave no indication as to what, if any, relevance such issues might have at trial.

Soon after delivering its *Diamond Match* opinion, the New York Court of Appeals gave further indication that ancillary restraint analysis was increasingly coming to be viewed as a realm of private contract law in which competition concerns had relatively little play. In *Hodge v. Sloan*,<sup>508</sup> the court upheld a buyer's covenant not to sell sand from particular purchased land in competition with the seller of that land, who had continued in the business of selling sand from other land in the area. While the arrangement in fact may have posed no significant threat to overall competition in local sand sales, the court emphatically did not proceed by discussion of efficiency and competitive concerns and then uphold the restraint on the ground that competition in fact was not imperiled. The court made no mention of the relevance of any such issues to the case. Instead, the court viewed the litigation as simply a case of reasonable protection for the seller's livelihood and preservation of the benefit of a private bargain in which the seller had accepted a lower price in order to obtain the buyer's restrictive covenant in addition to the sales price itself.<sup>509</sup> "Assuming . . . the covenant is in restraint of trade," the court declared, "it is still valid if it imposes no restriction upon one party which is not beneficial to the other."<sup>510</sup> Most fundamentally, the court reasoned that "the question presented is, upon the conceded facts, *really one of individual right with which the question of public policy has little if anything to do.*"<sup>511</sup>

The Missouri courts were at least as sympathetic toward ancillary restraints as the New York courts had been by the start of the 1890s. Indeed, there do not appear to be any reported cases in which the Missouri courts held such a restraint void prior to that date.<sup>512</sup> This general Missouri pattern continued in later years as well. When, for example, the St. Louis Court of Appeals undertook an important extended review of common law precedent in 1906, it approvingly quoted the *Diamond Match* opinion at considerable length, along with various other opinions, and pointedly went on to claim that the Missouri courts had embarked upon such an enlightened liberalization of ancillary restraint law well before the New York judges had done so themselves.<sup>513</sup>

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507. See *Watertown Thermometer Co. v. Pool*, 58 N.Y. Sup. Ct. (51 Hun.) 157, 4 N.Y.S. 861 (1889).

508. 107 N.Y. 244, 17 N.E. 335 (1887).

509. See *id.* at 252, 17 N.E. at 338.

510. See *id.* at 248, 17 N.E. at 336.

511. *Id.* at 250, 17 N.E. at 337 (emphasis added).

512. Cases upholding such restraints include, for example, *Gill v. Ferris*, 82 Mo. 156 (1884); *Peltz v. Eichele*, 62 Mo. 171 (1876); *Long v. Towl*, 42 Mo. 545 (1868); *Billings v. Ames*, 32 Mo. 265 (1862); *Presbury v. Fisher*, 18 Mo. 50 (1853).

513. See *Angelica Jacket Co. v. Angelica*, 121 Mo. App. 226, 98 S.W. 805 (1906).

Judge Taft's *Addyston Pipe* opinion had suggested that vertical arrangements as well as classic ancillary restraints appropriately should be spared the summary condemnation reserved for nonancillary agreements,<sup>514</sup> and it is useful at this point to compare the New York and Missouri courts' approach in this area as well. Although only few vertical restraint cases came to the attention of New York and Missouri jurists prior to the 1890s, both jurisdictions exhibited significant, if not unvarying, sympathy for these agreements. The courts in neither state, however, developed any general analytical framework for handling such arrangements. The New York Supreme Court, for example, approved a sole outlet contract, invoking principles of "partial" versus "general" restraint of trade and finding no public harm where there was no limitation on the volume the seller could produce and supply under the agreement.<sup>515</sup> A sole outlet and exclusive dealing agreement between an association of sheep sellers and an association of buyers, limited to the New York market and set to last three years, similarly was approved with a summary invocation of the principle that a contract to sell exclusively to a particular person for a limited time is not invalid.<sup>516</sup> Without undertaking any market share, foreclosure, efficiency, or competition analysis, the court simply noted that the defendant had not alleged any purpose or effect of limiting "the energies or productiveness, or usefulness to the public of either of these corporations."<sup>517</sup> Exclusive dealing also was approved when it was part of a patent licensing arrangement, even though it led to nonuse of the patent.<sup>518</sup> This, as well as the patentee's own nonuse, was simply within the ambit of the rights guaranteed by the patent monopoly.<sup>519</sup> On the other hand, a sole outlet agreement was held invalid when it was one of many such contracts constituting a scheme by a particular dealer to limit the quantity of coal shipped into New York State in an effort to enhance the resale price of this commodity.<sup>520</sup>

The Missouri courts developed a somewhat more mixed tradition of vertical restraint analysis by 1890. The St. Louis Court of Appeals summarily rejected a challenge to purchase price incentives established by a manufacturer to encourage adherence to resale price maintenance.<sup>521</sup> In other vertical cases, the Missouri Supreme Court relied largely upon the particular rights and duties of common carriers, as well as "partial" restraint of trade principles, to variously approve<sup>522</sup> or condemn<sup>523</sup> exclusive dealing arrangements involving railroads.

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514. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 287-88 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899). Addressing a railroad's exclusive dealing arrangement with a company that undertook to provide sleeping car service, Judge Taft concluded that such an arrangement only did through the service company what the railroad company rightfully could do itself through its own agent and that it promoted efficiency.

515. See *Van Marter v. Babcock*, 23 Barb. 633 (N.Y. Sup. Ct. 1857). The court thus extended "general" and "partial" restraint terminology beyond its original classic ancillary restraint setting.

516. See *Live Stock Ass'n v. Levy*, 54 N.Y. Super. Ct. (22 J. & S.) 32 (1886).

517. *Id.* at 36-37.

518. See *Good v. Daland*, 121 N.Y. 1, 24 N.E. 15 (1890).

519. See *id.* at 8, 24 N.E. at 16.

520. See *Arnot v. Pittston & Elmira Coal Co.*, 68 N.Y. 558 (1877).

521. See *Clark v. Frank*, 17 Mo. App. 602 (1885).

522. See *Wiggins Ferry Co. v. Chicago & Alton R.R.*, 73 Mo. 389 (1881). See *infra* note 585.

523. See *Cravens v. Rodgers*, 101 Mo. 247, 14 S.W. 106 (1890).

## 2. *Naked Restraints and the Virtues and Perils of Competition*

The New York courts' reaction to anticompetitive arrangements that were not functionally related to some other productive transaction was dramatically different than the courts' response to the ancillary restraints just discussed. For most of the nineteenth century, New York judges consistently and strongly condemned private nonancillary interference with free market competition even while simultaneously endorsing ancillary restraints at almost every opportunity. The change over time in the reported New York cases is every bit as striking, however. Until the 1880s, it appears that the New York courts invalidated every nonancillary restraint that came before them, except for the restraints at issue in two cases that arose in the late 1870s which involved special statutes. Those two cases, however, foreshadowed a very different judicial climate in the 1880s. In that decade, New York appellate courts upheld nonancillary restraints coming before them as often as they struck them down. The change was a dramatic one that cannot be explained simply by the peculiarities of the facts in the cases arising in that decade. By the time the Sherman Act was passed, the state's common law policy on naked restraints of competition was considerably more confused than it had been just ten or fifteen years earlier, and strikingly more ambivalent in its attitude toward private restrictions of free market rivalry.

Beginning with a famous labor conspiracy case in 1810,<sup>524</sup> New York courts condemned a wide variety of collective nonancillary restraints involving not only labor conspiracy,<sup>525</sup> but also bid rigging,<sup>526</sup> price fixing,<sup>527</sup> profit pooling,<sup>528</sup> output limitation,<sup>529</sup> direct money payments in exchange for cessation of competition,<sup>530</sup> collective restraints of stock sales,<sup>531</sup> and concerted manipulation of futures and stock market transactions.<sup>532</sup> In a few instances, the courts relied upon a New York statute prohibiting conspiracies "to commit any act injurious . . . to trade or commerce."<sup>533</sup> Most cases, however, were common law adjudications. The cases typically declared such arrangements void without any extended explanation. Prior to the 1880s, New York jurists never suggested that condemnation of nonancillary agreements depended on exclusion or coercion of nonparties; nor did they ever articulate any "reasonableness" standard for nonancillary restraints or suggest that such arrangements

524. *See* *People v. Melvin*, 2 Wh. Cr. Cas. 262 (1810).

525. *See* *People v. Fisher*, 14 Wend. 10 (N.Y. Sup. Ct. 1835).

526. *See, e.g.,* *Atcheson v. Mallon*, 43 N.Y. 147 (1870); *Brisbane v. Adams*, 3 N.Y. 129 (1849).

527. *See* *Clancey v. Onondaga Fine Salt Mfg. Co.*, 62 Barb. 395 (N.Y. Sup. Ct. 1862); *Stanton v. Allen*, 5 Denio 434 (N.Y. Sup. Ct. 1848); *Hooker v. Vandewater*, 4 Denio 349 (N.Y. Sup. Ct. 1847).

528. *See* *Atcheson v. Mallon*, 43 N.Y. 147 (1870); *Hooker v. Vandewater*, 4 Denio 349 (N.Y. Sup. Ct. 1847).

529. *See* *Arnot v. Pittston & Elmira Coal Co.*, 68 N.Y. 558 (1877).

530. *See* *Murray v. Vanderbilt*, 39 Barb. 140 (N.Y. Sup. Ct. 1863); *Hartford & New Haven R.R. v. New York & New Haven R.R.*, 3 Robt. 411 (N.Y. Super. Ct. 1865).

531. *See* *Fisher v. Bush*, 42 N.Y. Sup. Ct. (35 Hun.) 641 (1885).

532. *See* *Leonard v. Poole*, 114 N.Y. 371, 21 N.E. 707 (1889); *Livermore v. Bushnell*, 12 N.Y. Sup. Ct. (5 Hun.) 285 (1875).

533. *See* Act of Dec. 10, 1828, § 8(6), 2 N.Y. REV. STAT. 689, 691-92 (1829). *See, e.g.,* *Hooker v. Vandewater*, 4 Denio 349 (N.Y. Sup. Ct. 1847). In addition, one case involved a specialized statute, Act of May 10, 1841, ch. 183, § 16, 1841 N.Y. Laws 156, penalizing output limitation and price fixing among manufacturers of salt. *See* *Clancey v. Onondaga Fine Salt Mfg. Co.*, 62 Barb. 395, 404 (N.Y. Sup. Ct. 1862).

might ever be approved. While the parties in some of the cases seem to have had a large collective share of the market,<sup>534</sup> the market share involved in other cases is unclear,<sup>535</sup> and the courts never stated that this factor was a critical one. Invalidation did not require any showing that actual harm had occurred from adoption of such a restraint. As the New York Court of Appeals reiterated in the 1870 bid-rigging case of *Atcheson v. Mallon*:<sup>536</sup>

The true inquiry is, is it the natural tendency of such an agreement to injuriously influence the public interests? The rule is, that agreements, which in their necessary operation upon the action of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public, or of third parties, are against the principles of sound policy, and are void.<sup>537</sup>

Nineteenth century New York judges believed that competition produced a variety of highly important benefits, including lower and "fair" prices<sup>538</sup> and higher quality of service.<sup>539</sup> Preservation of competition was never deemed to require maintenance of all existing business rivalry, however, and the New York courts were careful to distinguish productive partnerships and other true joint ventures from naked cartel arrangements, despite contrary characterizations urged by litigants.<sup>540</sup> At the same time, elimination of artificial private restrictions also was deemed to have a

534. See, e.g., *Stanton v. Allen*, 5 Denio 434 (N.Y. Sup. Ct. 1848).

535. See, e.g., *Atcheson v. Mallon*, 43 N.Y. 147 (1870).

536. *Id.*

537. *Id.* at 149.

538. See, e.g., *People v. Lord*, 13 N.Y. Sup. Ct. (6 Hun.) 390, 394 (1876), *aff'd sub nom. People v. Stephens*, 71 N.Y. 527 (1878). In *Lord*, the New York Supreme Court condemned a bid-rigging scheme among construction companies bidding on a public works project, deeming it a violation both of ethics and of the property and exchange rights of the buyer. Declaring the arrangement "a fraud on the plaintiffs," *Lord*, 13 N.Y. Sup. Ct. (6 Hun.) at 393, the court noted that the object of the agreement "was to compel the State, if possible, to pay more for the work than it would have cost at fair prices or open competition." *Id.* at 394. The court went on to explain that courts analogously disapproved of bid rigging among buyers on the grounds

that such an agreement is unconscientious and against public policy, and has a tendency injuriously to affect the character and value of sales at public auction, and to mislead private confidence; that it operates as a fraud on the sale; that it is contrary to morality and sound policy; that it deprives the person selling of the opportunity of obtaining a full equivalent for the property.

*Id.* The court rejected pleas that condemnation of such behavior demanded too high a level of business ethics, concluding firmly, "[n]ot to enter into such combinations is only simple honesty." *Id.* at 400.

539. See, e.g., *Stanton v. Allen*, 5 Denio 434, 441 (N.Y. Sup. Ct. 1848). In *Stanton*, the court considered a price-fixing and pooling agreement among numerous transportation lines operating on the Erie and Oswego Canals, made expressly to establish "fair and uniform rates of freight, and to equalize the business among the members." The court condemned the arrangement as a pernicious attempt to exempt "the standard of freights, and the facilities and accommodations to be rendered to the public from the wholesome influence of rivalry and competition." *Id.* at 440. The court went on to explain more fully the public harm from such a private restriction of competition, declaring that the members having thrown their concerns into stock, to derive an income in proportion to the number of shares they hold, and not according to their merit and activity in business, and safe against the reduction of compensation that would otherwise follow mean accommodations and want of skill and attention, the public interest must necessarily suffer grievous loss. Indeed the consequence of such a state of things would shortly be, that freighters and passengers would be ill served, just in proportion as the carriers were well paid.

*Id.* at 441. In finding the arrangement void on the basis of both the New York statute penalizing conspiracies to commit an act injurious to trade, 2 N.Y. REV. STAT. 691-92, § 8(6) (1829), and the common law, *Stanton*, 5 Denio at 443, the court also noted the additional harm posed to public canal revenue, *id.* at 441, but never suggested that this factor was necessary to its ruling. The court otherwise gave no apparent weight to the fact that the defendants were canal boat operators and never indicated that price fixing in any other context might ever be tolerated.

540. See, e.g., *Marsh v. Russell*, 66 N.Y. 288 (1876) (finding defendants' pricing understanding to be the ordinary harmonization of activity among members of a productive partnership rather than price fixing among independent rivals).

critical ethical dimension and to be necessary to preserve the essential moral integrity of the economy and of the state itself. Thus, in a leading price-fixing case decided in 1848, the New York Supreme Court explained:

The rule that contracts and agreements are void when contrary to public policy, when properly understood and applied, is one of the great preservative principles of a state. Sound morality is the corner stone of the social edifice. Whatever, therefore, disturbs that, is condemned under that fundamental rule.<sup>541</sup>

In the 1870s, as problems of industrial "overcapacity" and "ruinous" competition began to become more prominent,<sup>542</sup> articulated judicial views on the merits of competition began to change noticeably. In 1876 the New York Supreme Court approved the action of the private New York Board of Fire Underwriters in expelling a member from its ranks for charging less than the uniform rates the board had prescribed.<sup>543</sup> The court voiced no concern over the economic impact of such activity. Instead, it simply noted that one of the board's purposes recited in the 1867 statute by which it was incorporated was "to establish and maintain uniformity among its members in policies or contracts of insurance."<sup>544</sup> Because contracts of insurance covering similar property but charging different rates would, in an important respect, not be uniform, the board was within its powers.<sup>545</sup>

Two years later the New York Supreme Court at Special Term and Chambers approved a profit-pooling arrangement between two competing New York telegraph companies and denied a minority shareholder's request for an injunction to restrain one of the two companies from making payments under the agreement.<sup>546</sup> The court conceded that at common law such a plan might be void as against public policy because of its tendency to prevent competition.<sup>547</sup> It noted, however, that the legislature had passed a statute authorizing joint activities by telegraph companies including consolidation and joint construction, maintenance, use, and lease of new lines.<sup>548</sup> While the activities noted in the statute all seem at least potentially justifiable as cost-saving integrations of productive efforts, the court read the statute still more broadly. Because to some extent the activities noted in the act would tend to prevent competition, the court held the statute should be read as an across-the-board declaration that the elimination of competition between telegraph companies was not against public policy.<sup>549</sup> In the court's view this was a good result because competition had proved to be detrimental in the telegraph industry, leading to needless duplication of cost and the reduction of rates below remunerative levels.<sup>550</sup> Where, for example, both firms previously had maintained offices in places "which

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541. *Stanton*, 5 Denio at 441. See also *supra* note 538.

542. See *supra* text accompanying notes 222-26.

543. See *People ex rel. Pinckney v. New York Bd. of Fire Underwriters*, 14 N.Y. Sup. Ct. (7 Hun.) 243 (1876).

544. *Id.* at 250.

545. *Id.* at 252.

546. See *Benedict v. Western Union Tel. Co.*, 9 Abb. N. Cas. 214 (N.Y. Sup. Ct., Spec. Term 1878).

547. *Id.* at 221.

548. *Id.* at 217-20.

549. *Id.* at 220.

550. *Id.* at 220-22.

could not afford sufficient business for both, an arrangement by which one of these companies should shut up its office and connect its wires with the office of the other company, and by which the receipts and expenses of this office should be divided," did not seem inappropriate.<sup>551</sup> Most broadly, the court declared that in light of the telegraph companies' statute,

no arrangement which [such companies] may make to prevent competition which would be ruinous to each, being against public policy, there is nothing in the action of the two defendants, such action being manifestly for the interest of all persons concerned, which calls for the intervention of the court.<sup>552</sup>

Judicial sympathy for nonancillary restrictions of competition, even where no special statute was implicated, became strikingly evident a decade later in a case decided by the New York Court of Appeals a year after it had liberalized ancillary restraint law in *Diamond Match*. In *Leslie v. Lorillard*,<sup>553</sup> the court approved an arrangement whereby one steamship company agreed to pay another steamship company a monthly fee in return for the latter's forbearance from competing against the former's New York to Virginia route. In response to a challenge to the arrangement brought by a shareholder of the paying company, the court reviewed common law restraint of trade principles to determine whether such an agreement contravened public policy. In so doing, the court simultaneously gave dramatic indication of the state of judicial thought in New York as of the late 1880s.

Judge John Clinton Gray, writing for the court, declared that common law prohibitions on restraints of trade had relaxed over the years as the scope of commercial and industrial activity had spread, making "such agreements less dangerous as tending to create monopolies."<sup>554</sup> Common law judges clearly had recognized that "[t]he object of government . . . was not to interfere with the free right of man to dispose of his property or of his labor,"<sup>555</sup> but instead was simply to protect society against the harms that might result where an individual hindered his own ability to earn a livelihood or society lost the benefits of competition in skilled labor.<sup>556</sup> Judge Gray deemed the latter possibility a remote one under modern circumstances, except in one special situation. "In later times," he reasoned, "the danger in such agreements seems only really to exist when corporations are parties to them, for their means and strength would better enable them to buy off rivalry and to create monopolies."<sup>557</sup> He stressed, however, that while corporations posed unusual dangers, they also promised unusual benefits for society. Although they could become a "public menace" if allowed "to control and monopolize the avenues to that industry in which they are engaged," they were also "great engines for the promotion of the public convenience, and for the development of public wealth."<sup>558</sup>

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551. *Id.* at 220-21.

552. *Id.* at 222.

553. 110 N.Y. 519, 18 N.E. 363 (1888).

554. *Id.* at 532-33, 18 N.E. at 365.

555. *Id.* at 533, 18 N.E. at 366.

556. *Id.*

557. *Id.*

558. *Id.*

Accordingly, while restraints on competition should be invalidated if they went "beyond measures for self protection" and posed a significant threat to the public good, such invalidation should only occur when there existed "evident grounds"<sup>559</sup> to support it, and courts otherwise should be wary of "interfering with and restraining the conduct of the affairs of individuals or of corporations."<sup>560</sup>

Even though the case before the court did involve the "special" situation of corporate parties to an agreement, the court nevertheless evaluated the arrangement according to the same restraint of trade principles applicable to individuals and unincorporated firms. These principles, Judge Gray declared, had been well stated in Judge Andrews' careful opinion in *Diamond Match*. Neither sensing nor articulating any difference between ancillary restraints of the type involved in *Diamond Match* and the naked restraint of competition established by the steamship companies in *Leslie v. Lorillard*, Judge Gray sweepingly declared that the former case stood for the proposition that "no contracts are void as being in general restraint of trade, where they operate simply to prevent a party from engaging or competing in the same business."<sup>561</sup> The steamship arrangement did no more to exclude *third parties* from competing in the trade than had the agreement between the match manufacturers in the earlier case.<sup>562</sup> The steamship case thus was deemed to be in no important respect "different from the simpler case of the sale by an individual of his business and his right to conduct it in a particular part of the land," and *Diamond Match* was controlling.<sup>563</sup>

Thus, within the space of a year the liberalized approach established in *Diamond Match* to validate self-protective covenants ancillary to other, potentially beneficial main transactions was transformed by the New York Court of Appeals into a general rule validating nonancillary self-protection as an end in itself. The court's decision did not rest simply on a belief that competition was not significantly imperiled by agreements like the one the steamship companies had made. The opinion also reflected substantial doubt as to whether competition was in fact always desirable. In Judge Gray's view,

[w]hether competition in this particular business would be a public benefaction, or its restraint a source of prejudice, we are unable, of course, to judge. I do not think that competition is invariably a public benefaction; for it may be carried on to such a degree as to become a general evil.<sup>564</sup>

Such doubts reappeared in a New York Supreme Court case decided soon thereafter, in which another nonancillary restraint was upheld. In *Ives v. Smith*,<sup>565</sup> the supreme court at general term adopted a special term opinion<sup>566</sup> that had approved a

559. *Id.*

560. *Id.*

561. *Id.* at 534, 18 N.E. at 366.

562. *Id.*

563. *Id.*

564. *Id.*

565. 62 N.Y. Sup. Ct. (55 Hun.) 606, 8 N.Y.S. 46 (1889) (*per curiam*).

566. 3 N.Y.S. 645 (Sup. Ct., Spec. Term 1888), *aff'd per curiam*, 62 N.Y. Sup. Ct. (55 Hun.) 606, 8 N.Y.S. 46 (1889).



private territorial division governing the geographic areas of the Pacific Northwest in which competing railroads would each build their respective new tracks. Finding the plaintiff entitled to a temporary injunction against threatened violations of the agreement, the special term opinion acknowledged that an earlier New York case<sup>567</sup> had condemned an agreement under which one railroad company paid another \$1,000 per month for continued nondevelopment of a potentially competing railroad line just north of the Connecticut state boundary. The *Ives* court sought to distinguish that opinion, however, as, at most, a declaration against elimination of means of travel and competition between roads actually built and in operation “or contemplated to be built on fixed and determined routes.”<sup>568</sup> It concluded that a different result was called for when the agreement related to future lines to be built in areas not yet opened to railroad service. In that circumstance, the agreed elimination of competition through territorial division was a public good because it promoted development in new areas which would proceed more rapidly when the companies no longer had to divert resources into countering the competitive efforts of others in the same locale.<sup>569</sup> Without any further discussion of market share, the extent of potential unrestrained competition, or of any special “natural monopoly” characteristics of the railroad industry that might justify a modification of ordinary restraint of trade principles, the court buttressed its view of the harm that might result if one of the companies were allowed to invade new territory not assigned to it by citing one of the leading railroad economists of the age. Should the company not be stopped, the court declared, millions of dollars might be spent “in what Mr. Adams has termed a ‘war of construction’ which he has characterized as a ‘folly almost amounting to a crime.’”<sup>570</sup>

In the same year, however, the New York Supreme Court did strongly reiterate a more traditional approach to nonancillary restraints of competition in the classic case of *People v. North River Sugar Refining Co.*<sup>571</sup> The court condemned a New York corporation’s participation, along with sixteen other companies, in the price-fixing Sugar Trust, declaring it to be a violation of the state’s statutory prohibition against conspiracies “to commit any act injurious . . . to trade or commerce.”<sup>572</sup> The court distinguished *Diamond Match* on the basis of Judge Andrews’ assertion in that case that price-fixing combinations “stood on a different footing” than ancillary restraints of the sort the match manufacturers had made;<sup>573</sup>

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567. *Hartford & New Haven R.R. v. New York & New Haven R.R.*, 3 Robt. 411 (N.Y. Super. Ct. 1865). A similar result also had been reached in *Murray v. Vanderbilt*, 39 Barb. 140, 152 (N.Y. Sup. Ct. 1863) (payments of \$40,000 per month for not competing against another steamship company).

568. *Ives*, 3 N.Y.S. at 654.

569. *See id.*

570. *Id.* at 656. While the court gave no citation for the quotation, it likely had in mind the work of Charles Francis Adams, Jr., who became the leading original member of the Massachusetts Board of Railroad Commissioners and a leading writer on the subject of railroad economics. *See* T. McCRAW, *supra* note 5, at 1–56. It is possible, but less likely, that the court was referring to a comment by Henry Carter Adams, who became chief statistician of the Interstate Commerce Commission. *See* H. THORELLI, *supra* note 1, at 320.

571. 7 N.Y.S. 406 (Sup. Ct. 1889), *aff’d*, 121 N.Y. 582, 24 N.E. 834 (1890).

572. *See North River Sugar*, 7 N.Y.S. at 411 (quoting Act of Dec. 10, 1828, § 8(6), 2 N.Y. REV. STAT. 689, 691–92 (1829)).

573. *See North River Sugar*, 7 N.Y.S. at 413.

and the supreme court proclaimed without further explanation that *Leslie v. Lorillard* was a case whose facts were so different that it simply was inapplicable to the Sugar Trust scheme.<sup>574</sup> In sharp contrast to the faith in the power of potential competition displayed by the New York Court of Appeals in those two earlier leading cases, the supreme court declared potential new entry both unlikely and irrelevant in the situation before it:

That, in view of the large capital and extended combination already secured, is a very remote probability; for other manufacturers, brought in competition with this combination, could easily be driven from the field of trade by it, and its paramount control still maintained and perpetuated. And the probability that its power would be used in this manner is so decidedly fortified by experience that capital would be reluctantly placed at the risk of loss by other persons, with so formidable a competitor to be encountered. But, if it should be otherwise, the law will not tolerate or excuse the combination; for the interposition of third persons, in no way connected with it, to counteract its effects, is no excuse or justification for the wrong this combination has in this manner committed. A wrongdoer is never excused from the consequences of his wrong for the reason that other parties, not acting under his direction or authority, may interpose, and in a measure defeat the consequences of the wrong.<sup>575</sup>

On appeal, the New York Court of Appeals affirmed the supreme court's decision revoking the defendant's corporate charter, in an opinion delivered just one week before the Sherman Act took effect.<sup>576</sup> The court of appeals did so, however, solely on the ground that the defendant had exceeded and abused its corporate powers and violated public policy by evading normal state corporate law controls on the establishment, management, and operation of corporations.<sup>577</sup> The court of appeals pointedly declined to reconsider restraint of trade principles or to invoke them as a basis for condemnation of the Sugar Trust, declaring it "needless to advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy. Our duty is to leave them until some proper emergency compels their consideration."<sup>578</sup> Thus, it unanimously decided as it did "[w]ithout either approval or disapproval of the views expressed upon that branch of the case by the courts below."<sup>579</sup>

By 1890 Missouri case law generally was no more hostile to private restraints of competition than New York precedent had become. Missouri courts continued to condemn bid rigging at public or private sale, for example, as they repeatedly had done in prior decades.<sup>580</sup> But in the late 1870s and early 1880s certain other anticompetitive agreements elicited substantial sympathy. The mixture of Missouri judicial sentiments at this time, and the increasing judicial sympathy for some private

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574. *See id.* at 414.

575. *Id.*

576. *People v. North River Sugar Refining Co.*, 121 N.Y. 582, 24 N.E. 834 (1890).

577. *See id.* at 623–25, 24 N.E. at 840–41.

578. *Id.* at 626, 24 N.E. at 841.

579. *Id.*

580. *See, e.g., Engelman v. Skrainka*, 14 Mo. App. 438, 441 (1883) (noting earlier cases and declaring: "It is an uniform rule, founded in public policy, that any contract, the necessary effect of which is to stifle competition in bidding at public or private sales, or at lettings of public or private work, is void").

limitations of full-blown business rivalry, became strikingly evident in a series of opinions rendered during these years by the St. Louis Court of Appeals.

In 1878 the St. Louis Court of Appeals strongly reaffirmed traditional antipathy to private restraints on competition in a case considering the legitimacy of an arrangement under which a railroad company had agreed to exclusively employ the plaintiff ferry company to transport freight and passengers between the Illinois and Missouri shore opposite St. Louis, in return for the ferry company's transfer of a tract of land the railroad desired.<sup>581</sup> The court declared that the plaintiff's broad construction of the contract would render the arrangement void as a restraint of trade because it would prevent the defendant common carrier from taking advantage of new forms of ferry transportation that were not used by the plaintiff but that were offered by other ferry companies, specifically, technological innovations allowing entire railroad cars to be ferried without any unloading and reloading of their contents.<sup>582</sup> In so holding, the St. Louis Court of Appeals reviewed and strongly reiterated established common law prohibitions on restraints of trade. Invoking the New York Supreme Court's earlier opinion in *Hooker v. Vandewater*<sup>583</sup> and other leading cases,<sup>584</sup> the court declared:

The odious nature of monopoly, early recognized by the English law, has become more apparent as commerce has increased. The law fully recognizes the necessity of competition, and here again not only takes notice of but enforces a rule of trade. . . . So agreements or combinations the effect of which is to prevent or withdraw competition are held to be against the policy of the law, and void. . . . In the case at bar, that competition which would ensue were the three ferry companies allowed freely to compete for such freights as might have sought the cheapest and best of the three would be destroyed, on the basis of the construction of the contract of 1864 now contended for. The evidence shows, moreover, that the appellant was engaged in close competition, at different points, with rival railway companies having their termini opposite St. Louis. In so far as restraints were imposed upon the appellant, and its facilities for business abridged, it would be unable to compete with rival companies not so hampered. The tendency of competition is, indeed, to cheapen values; but it is also to promote better and do away with inferior methods; to make men use advantages to the utmost; and its withdrawal implies a loss to the community which is great in proportion to the importance and volume of the business involved. In no department of commerce is competition more important, especially in a widely extended country, of various productions, than in that by which the people of such a country communicate with each other and exchange the products of their labor. This competition cannot be maintained if the carrier is seriously weighted in the race; and, indeed, the argument of the respondent, pushed to its logical results, would end in the abandonment of business by a railway company and the forfeiture of its franchise.<sup>585</sup>

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581. See *Wiggins Ferry Co. v. Chicago & Alton R.R.*, 5 Mo. App. 347 (1878), *rev'd*, 73 Mo. 389 (1881).

582. 5 Mo. App. at 370-79.

583. 4 Denio 349 (N.Y. Sup. Ct. 1847). See *supra* notes 527, 533 and accompanying text.

584. See *Wiggins Ferry*, 5 Mo. App. at 373-74.

585. *Id.* (citations omitted). In 1881 the Missouri Supreme Court reversed the decision of the St. Louis Court of Appeals. See *Wiggins Ferry Co. v. Chicago & Alton R.R.*, 73 Mo. 389 (1881). The Missouri Supreme Court pointedly noted that the defendant was seeking to escape liability for its breach of contract while retaining the benefits of the land it had received from the plaintiff, see *id.* at 411-12, and declared that the defendant had not adequately demonstrated that the contract was against public policy. See *id.* Invoking principles traditionally applied to judge the legality of ancillary restraints, see *supra* text accompanying notes 484-86, the supreme court declared that the arrangement was not an invalid

This same court, however, two years previously had indicated significantly greater ambivalence regarding the virtues of competition, and before long would promulgate one of the leading late nineteenth century opinions upholding self-protection through cartelization. In 1876 in the case of *Koehler v. Feuerbacher*,<sup>586</sup> the St. Louis Court of Appeals had sustained an agreement by three competing park owners to refrain for twelve months from paying a bonus to any club or society to induce it to select a particular park for festivities, and to refrain from paying for any music band employed by such societies. The court noted that conceptions of public policy changed greatly over time, stressing as an example the way that forestalling, engrossing, and regrating had once been illegal in England but had since become firmly accepted as a legitimate and beneficial part of trade.<sup>587</sup> While contracts in "total" restraint of trade admittedly constituted one of the very few categories of contracts that were against public policy, the arrangement at issue was not such an agreement.<sup>588</sup> Indeed, the court reasoned, it was not an agreement to keep up prices, as the defendants contended, because, if not restrained, the offering of bonuses to organizations to induce their selecting one park over another would tend to increase "the price of admission to the entertainment."<sup>589</sup> The court's decision, however, did not rest simply on the perceived peculiarities of competition among private park owners. The opinion reflected at least in part a somewhat broader vision of morality and of the legitimate moderation of competition in the marketplace:

An agreement to be no longer a party to such a system of unfair competition strikes us as being eminently in the interest of good morals, fair and free trade, and honest rivalry in business. If dry-goods houses in a certain town should agree to employ no drummers for trade, or hotel-keepers to employ no runners, the contract would be much of the same character, and we see nothing illegal about it.<sup>590</sup>

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restraint of trade, because it was "not general as to space, but only partial and special." *Wiggins Ferry*, 73 Mo. at 411. As the court explained:

The space in which the restriction is to operate is limited to the Illinois shore opposite the city of St. Louis, and is only a partial restraint in that space, the restriction being not that defendant will not employ any ferry at all, but that it will only employ that of plaintiff. We can not say from anything appearing in the contract that such limitation is unreasonable, and it is not, therefore, obnoxious to the rule.

*Id.* The contract was not deemed unreasonable because the court believed that it would not produce the pricing and efficiency harms noted in the opinion of the St. Louis Court of Appeals. The public was protected because while the defendant had a duty "to secure the transit over the river with facility and dispatch of all persons and property which either trade or the public interest might demand," *id.* at 410, the plaintiff was obligated "to furnish and maintain wharf and steam ferry boats sufficient to do with promptness and dispatch all the ferrying of passengers and freight requiring it." *Id.* at 410. The public would not be deprived of the use of new, more efficient car-transfer technology and lower prices because, in the court's view, the defendant had a right to demand that the plaintiff adopt such technology. As the court explained, "If the ferrying of freight loaded in cars without breaking bulk had been demanded by defendant because it was cheaper, safer, and more expeditious than transfer by parcels, it would have been the duty of plaintiff to have provided boats to meet the demand." *Id.* at 413.

586. 2 Mo. App. 11 (1876).

587. *See id.* at 14. On the offenses of forestalling, engrossing, and regrating, which in large measure addressed the purchase and sale of foodstuffs by middlemen wholesalers, see W. LETWIN, *supra* note 167, at 32-39; H. THORELLI, *supra* note 1, at 15-17.

588. *See Koehler*, 2 Mo. App. at 14.

589. *Id.* at 15.

590. *Id.*

Four years later, the same court again expressed considerable sympathy for competitive restraint in an opinion matching *Leslie v. Lorillard* for its confusion of ancillary and nonancillary considerations and its apprehension that the presence or absence of corporations might alter the analysis. In the well-known 1880 case of *Skrainka v. Scharringhausen*,<sup>591</sup> the St. Louis Court of Appeals approved a price-fixing agreement among twenty-four operators of stone quarries located in a particular part of St. Louis. The court again noted that the old common law doctrines on restraint of trade had been modified in light of changing social and economic conditions and improved understanding of the laws of trade.<sup>592</sup> Although contracts in restraint of trade still were void, the court explained, judicial determinations of which arrangements fell within that category had evolved over time.<sup>593</sup> The question in each case was the impact of the agreement. Did the agreement impair a party's livelihood, deprive the public of useful services, discourage industry, diminish competition, or enhance prices?<sup>594</sup> Harm might well result when "large companies or corporations" excluded rivalry and engrossed markets, thereby "making a corner."<sup>595</sup> Indeed, as commerce had expanded, "the odious nature of monopoly"<sup>596</sup> had become increasingly more evident:

The danger to be apprehended from the accumulation of wealth and power in the hands of great corporations, and the abuses by which large capitalists may so combine as to relax or destroy competition in trade, are matters of public concern, and the essential question is one of monopoly and of injury to the public.<sup>597</sup>

But, the court declared, not every restriction of trade could be deemed harmful or void. Without noting any possible differences between an ancillary restraint and a price-fixing cartel, the court extended traditional ancillary restraint categories to nonancillary combinations as well, reiterating that whereas a "general" restraint was void, a "partial" and reasonable restraint was not when it merely gave "fair protection to those in whose favor it is made" and did not extend so far as to harm the general public.<sup>598</sup>

In the court's view, the quarrymen's cartel fell into the latter category of legitimate partial restraint. It involved only the quarrymen of one part of one city and not even all of them. There was no evidence it had caused public harm, and it was not apparent from its terms that this time-limited agreement tended to deprive people of employment, unduly increase prices, create a monopoly, or eliminate competition.<sup>599</sup> The court found plausible the small operators' claim that the agreement in fact tended to advance trade, "because, if competition reaches such a point that goods cannot be sold at living prices, many manufacturers must be driven out of business."<sup>600</sup> Indeed,

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591. 8 Mo. App. 522 (1880).

592. *See id.* at 525.

593. *See id.*

594. *See id.* at 527.

595. *Id.* at 525.

596. *Id.* at 526.

597. *Id.*

598. *Id.* at 527.

599. *See id.*

600. *Id.* at 525.

the court stated that it knew “‘of no case in recent times in which a contract such as the one before us has been declared illegal.’”<sup>601</sup>

### C. *Addyston Pipe and the State of Pre-Sherman Act Common Law*

Judge Taft's *Addyston Pipe* opinion was a brilliant effort to extract analytically coherent tendencies from the aggregate mass of nineteenth century American common law precedent.<sup>602</sup> In demarcating majority and minority trends, however, Judge Taft did not necessarily identify clear differences among jurisdictions as much as contradictory tendencies within individual state systems. Judging from the New York and Missouri pattern, it appears that state judges did strongly sympathize with ancillary restraints in the manner Taft suggested.<sup>603</sup> Taft's characterization of majority and minority approaches to nonancillary restraints, however, is potentially misleading as a general guide to pre-Sherman Act common law adjudication; for, despite earlier judicial hostility, tolerance of nonancillary restraints had become not merely a minority exception, but a powerful trend in at least New York<sup>604</sup> and Missouri<sup>605</sup> by the start of the final decade of the nineteenth century.

Leading accounts of the overall state of nineteenth century American common law have noted that it supported a policy of free competition more strongly than did contemporary English case law on restraints of trade.<sup>606</sup> While this may well be true in general, it is important to keep in mind not only the significant differences among American jurisdictions, but also the way that doctrine changed within particular jurisdictions over time. When the new federal antitrust act was passed in 1890, courts in both New York and Missouri had modified ancillary restraint law in a way that was very similar to the liberalization contemporary English courts had effected over time and would soon indicate most strikingly in the classic 1894 case of *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*<sup>607</sup> Nonancillary restraint doctrine had changed even more substantially. Late nineteenth century New York and Missouri opinions in nonancillary restraint cases at times departed quite dramatically from traditional economic and legal analyses and arguably had tempered judicial support for competition even more significantly by 1890 than had the English approach that was reflected in the leading case of *Mogul Steamship Co. v. McGregor, Gow & Co.*<sup>608</sup>

601. *Id.* at 527.

602. See R. BORK, *supra* note 6, at 26; W. LETWIN, *supra* note 167, at 174.

603. See *supra* text accompanying notes 480–513.

604. See *supra* text accompanying notes 553–79.

605. See *supra* text accompanying notes 586–601.

606. See, e.g., H. THORELLI, *supra* note 1, at 39, 52.

607. 1894 App. Cas. 535 (upholding an ancillary restraint barring competitive efforts anywhere in the world for a period of 25 years). For discussions of the case, see W. LETWIN, *supra* note 167, at 44–46; H. THORELLI, *supra* note 1, at 20.

608. 21 Q.B.D. 544 (1888), *aff'd*, 1892 App. Cas. 25 (finding a loose combination engaged in anticompetitive, predatory behavior to not be an *illegal* conspiracy even if the collective agreement might be void at common law and thus not enforceable among the parties to it). For discussions of the case, see W. LETWIN, *supra* note 167, at 49–51; H. THORELLI, *supra* note 1, at 34.

In the late 1870s and 1880s, New York and Missouri jurists heralded the expansion of markets, the march of industrial progress, and the pervasiveness of economic opportunity. In these years, the judges in these states tended to express heightened concern not for private restraint of competition, but instead for government restriction of private activity and the potential dangers of excessive, "ruinous" competition in the face of a newly severe threat of "overproduction" in many American industries. Yet, as cartelization and concentration increased in the 1880s and on into the 1890s, and as the power and prevalence of corporate capitalism intensified, other Americans grew ever more alarmed over the apparent dangers posed by private anticompetitive conduct. The traditionalist perspectives of these Americans prompted the passage of a growing body of new state and federal antitrust legislation which laid the foundation for a large volume of state and federal restraint of trade litigation between 1890 and 1918. In these cases, New York and Missouri jurists would be asked to reassess their recent departures from traditional analyses in a setting of augmented popular concern for private anticompetitive behavior. It is to the story of this new legislation and litigation that this Article now turns.

## VII. THE POLITICAL, LEGAL, AND CONCEPTUAL CONTEXT OF ANTITRUST ACTIVITY IN NEW YORK AND MISSOURI

### A. *New York: Antitrust Law and the Natural Economic Order*

During the Progressive Era, New York and Missouri both became unusually active<sup>609</sup> centers of antitrust agitation, investigation, legislation, and adjudication, frequently gaining national attention from observers elsewhere interested in contemporary antitrust enforcement and analysis.<sup>610</sup> Popular concern with the late nineteenth century rise of large industrial combinations led to repeated New York legislative hearings on the subject in 1875, 1878, 1880, 1885, 1889, 1892, and 1897.<sup>611</sup> Such concerns also led to the passage of a series of statutes to supplement New York's 1828 general conspiracy statute,<sup>612</sup> beginning with an 1890 prohibition against combinations of corporations "for the prevention of competition."<sup>613</sup> This statute was followed by a broader 1893 act banning

Every contract or combination in the form of trust or otherwise . . . whereby competition in the state of New York in the supply or the price of any article or commodity of common use

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609. See, e.g., NEW YORK STATE BAR, *supra* note 436, at 2a, 4a, 6a-15a (noting New York developments); H. SEAGER & C. GULICK, TRUST AND CORPORATION PROBLEMS 339-66 (1929) (highlighting Missouri developments); H. THORELLI, *supra* note 1, at 265 (noting the prominence of New York efforts in a survey of state antitrust activity through 1902). See also *infra* note 661 and accompanying text (noting that Missouri collected antitrust fines in an amount comparable to the total amount collected in all federal antitrust cases in the same period).

610. See, e.g., *infra* text accompanying note 658.

611. See NEW YORK STATE BAR, *supra* note 436, at 6a.

612. See Act of Dec. 10, 1828, § 8(6), 2 N.Y. REV. STAT. 689, 691-92 (1829) (making it a misdemeanor to "conspire . . . to commit any act injurious to . . . trade or commerce").

613. See Stock Corporation Law, ch. 564, § 7, 1890 N.Y. Laws 1069, amended by Act of May 18, 1892, ch. 688, § 7, 1892 N.Y. Laws 1828.

in said state for the support of life and health may be restrained or prevented, for the purpose of advancing prices . . . .<sup>614</sup>

New York's most important antitrust legislation was enacted in the late 1890s, however, in the wake of the hearings and recommendations of a special committee of the state legislature, chaired by Senator Clarence Lexow, that scrutinized the history and operations of the sugar, soda, and tobacco "trusts."<sup>615</sup> First enacted in 1897,<sup>616</sup> this new legislation was modified in certain procedural aspects relating to discovery of evidence two years later and reenacted by an overwhelming legislative majority as the Donnelly Act of 1899.<sup>617</sup> The Act declared illegal:

Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented . . . .<sup>618</sup>

The statute established a maximum fine of \$5,000 and a maximum jail term of one year,<sup>619</sup> and authorized the Attorney General to seek injunctive relief.<sup>620</sup>

In recommending the legislation that would become New York's principal antitrust statute, the Lexow Committee's well-known 1897 report<sup>621</sup> provided a remarkably thorough and systematic review of the traditional economic and political perspectives that pervasively influenced contemporary federal and state antitrust analysis.<sup>622</sup> Accordingly, the report helps to clarify traditionalist aspects of the federal antitrust analyses already discussed, and simultaneously provides a useful preface to the examination of post-Sherman Act state jurisprudence which follows.

The Lexow Committee members and other like-minded legislators did not focus exclusively on any single economic desideratum such as "consumer welfare" or productive efficiency, or on the prevention of any single form of economic mischief, such as the reduction of output. Rather, these New York legislators understood economic life in more traditional terms, as the integrated product of basic natural laws and processes, and attributed distortions and defects in economic life to artificial

614. Act of May 17, 1893, ch. 716, 1893 N.Y. Laws 1782. In 1896 the act was amended to expressly cover corporations and to give the Attorney General power to seek injunctive relief. *See* Act of Apr. 15, 1896, ch. 267, 1896 N.Y. Laws 212.

615. *See* JOINT COMM. OF THE SENATE AND ASSEMBLY APPOINTED TO INVESTIGATE TRUSTS, REPORT AND PROCEEDINGS (1897) [hereinafter LEXOW REPORT]. The establishment and operation of this committee were the subject of considerable press and public attention at the time. *See, e.g.,* N.Y. Times, Jan. 21, 1897, at 4, col. 3; *id.* Jan. 26, 1897, at 3, cols. 3-4; *id.* Feb. 16, 1897, at 3, cols. 1-2; *id.* Feb. 18, 1897, at 12, cols. 2-5; *id.* Mar. 10, 1897, at 4, cols. 2-3.

616. Act of May 7, 1897, ch. 383, 1897 N.Y. Laws 310.

617. Act of May 25, 1899, ch. 690, 1899 N.Y. Laws 1514. The New York Senate reportedly passed the measure by a vote of 33 to 2. *See* NEW YORK STATE BAR, *supra* note 436, at 14a.

618. Act of May 25, 1899, ch. 690, § 1, 1899 N.Y. Laws 1514.

619. *See id.* § 2. These were the same maximum penalties that Congress had provided in the Sherman Act in 1890. *See* ch. 647, §§ 1-3, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-3 (1982)).

620. Act of May 25, 1899, ch. 690, § 3, 1899 N.Y. Laws 1514. A 1910 amendment increased the maximum penalties for corporations to \$20,000. *See* Act of June 23, 1910, ch. 633, 1910 N.Y. Laws 1672.

621. *See, e.g.,* NEW YORK STATE BAR, *supra* note 436, at 7a-10a; H. THORELLI, *supra* note 1, at 354-55.

622. *See supra* text accompanying notes 198-266.



interference with this natural economic order. The Committee's report explained the rise of the new economic concentration in precisely these terms and advocated new statutory measures as a way to reestablish the natural patterns of economic life that Committee members thought would protect a variety of important economic, social, and political values simultaneously.

Like many Americans of the time,<sup>623</sup> these state legislators had a mixed view of economic concentration and sought to distinguish beneficial combinations of capital from large-scale aggregations that deserved condemnation as abnormal deviations from normal economic patterns. Combinations of capital, the Committee noted, often could provide important economies of operation and bring together the best skills and machinery.<sup>624</sup> The increasing size of these combinations in recent years was not itself problematic in the Committee's view: "That it is a natural evolution seems clear from the fact that it is the universal concomitant of progress, marking in fact, to a very large extent, the progressive stages of commercial development created by the natural impulse toward better conditions . . . ."<sup>625</sup>

Any effort to simply outlaw large combinations, indeed, would threaten not only economic progress, but also the very bases of natural economic life and the principles of liberal government. Preservation of natural economic life critically depended upon respect for liberty, property, and freedom of contract. Stressing the third of these interrelated rights in particular, the Committee explained: "The right of contract coexists with and is incidental to the right of liberty and property, and is recognized in the natural law as the very foundation of human progress and development. It is a sacred privilege of the citizen which is carefully guarded by the Constitution . . . ."<sup>626</sup> Echoing fears of paternalism prominently expressed in contemporary constitutional case law,<sup>627</sup> the Committee declared it essential that "the State should not exercise parental authority or unduly interfere with the operations of the natural law."<sup>628</sup> At the same time, however, it was critical that the state act to prevent private parties from interfering with such operations themselves.<sup>629</sup>

If ordinary combinations of capital, even on a large scale, were simply the inevitable product of natural economic evolution, "trusts" were the artificial perversion of the natural order:

[W]e define the trust to be an aggregation, brought about for the purpose of operating against the natural law of supply and demand, destroying competition by combination and unfair methods in order to secure control of both product and market, or permitting competition to exist only colorably and to the extent of refuting the charge of absolute monopoly. The one

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623. See, e.g., R. HOFSTADTER, *Antitrust Movement*, *supra* note 85, at 192.

624. See LEXOW REPORT, *supra* note 615, at 8.

625. *Id.*

626. *Id.* at 31.

627. See *supra* text accompanying notes 53, 186-93.

628. LEXOW REPORT, *supra* note 615, at 9. See also *id.* at 12.

629. On this central aspect of nineteenth century theory more generally, see *supra* text accompanying notes 130-53.

moves with the natural law; the other is designed to and does operate against the natural law.<sup>630</sup>

Such artificial combinations of capital generated numerous social and economic harms. As the New York Senate and Assembly noted in their concurrent resolution establishing the Lexow Committee:

Combinations of capital in the form of trusts or otherwise appear to exist and to be increasing in number and influence in this commonwealth, resulting in concentrating in the hands of a few, various important branches of industry, creating monopolies, shutting out competition, displacing labor and driving the citizen of moderate means out of business with the effect that production and price are regulated not by the natural laws of supply and demand, or the rules of normal and healthy competition, but by the arbitrary decision of combinations operating together to destroy competition and exact unreasonable charges from the people . . .<sup>631</sup>

The Committee concluded that all these pernicious effects indeed had followed the establishment of the specific "trusts" it had been charged to investigate.<sup>632</sup> Among these various specific harms, the Committee stressed most strongly not the damage done to consumer prices or to productive efficiency, but instead the impediments raised to equal economic opportunity for competing producers and potential new entrants. While the Committee emphasized that freedom of contract was the critical starting point for analysis, this principle was not thought to preclude legislative restriction of trust combination. Such massive combinations absorbed, destroyed, or scared off others who otherwise would participate in New York trade. In so doing, they infringed those persons' rights to trade and exchange, and thus distorted and diminished the natural state of economic life.<sup>633</sup> Prosperity depended on undiminished commercial investment in the state, which demanded business confidence.<sup>634</sup> This in turn required "an inviolable guarantee" of "the enduring protection of just and equal laws" and "the fullest opportunity of employment and expansion" for "[g]enius, capital, and labor." The law would be a mere "hollow mockery" if it allowed a trust aggregation to monopolize an industry so as to discourage new entry by others, leading to decreased investment of competing capital and reduced opportunities for the employment of labor.<sup>635</sup> In such a context, restriction of "trust" combination activity did not violate the principle of freedom of contract, for that principle had never been deemed to be one without limit or qualification:

The law which protects the individual in the acquisition and use of property and guarantees to him the fullest opportunity for its enjoyment couples with this protection a guarantee and condition that such use shall not be oppressive. . . . *Sic utere tuo ut alienum non laedas*, is a maxim as old as civilization itself and illustrates the proposition that the sacred right of contract and the incidental privilege of combination are both subject to the qualification that

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630. LEXOW REPORT, *supra* note 615, at 10.

631. New York S. Doc. 1897, Vol. VII, No. 40, at 3-4 (as quoted in NEW YORK STATE BAR, *supra* note 436, at 8a n.51).

632. See LEXOW REPORT, *supra* note 615, at 12.

633. See *id.*

634. See *id.* at 12-13.

635. See *id.*

they shall be exercised so as not to prejudice the rights of others or the interests of the people.<sup>636</sup>

The Committee rejected countervailing arguments that "trusts" generated important economic benefits. In so doing, it treated anticompetitive, yet assertedly efficient, combinations in a manner quite similar to the approach taken by congressional antitrust advocates in 1890 when they were faced with the same potential threat to traditional theory.<sup>637</sup>

The Committee dismissed the possible significance of trust-generated cost savings on the ground that there was no evidence that trusts lowered prices to consumers to the full extent of their new savings,<sup>638</sup> declaring that, indeed, there was evidence that prices had sometimes risen despite such savings.<sup>639</sup> While the advent of trust combination may have led to more stable prices, this was an "abnormal and not a natural condition," one that "revolutionize[d] the law of supply and demand" and kept prices at higher levels while perniciously creating "inequality among the people."<sup>640</sup> There was no evidence that trust activity improved the quality of goods, and logically its natural tendency would be the reverse, because the spur of competitive pressure was missing once market control was attained.<sup>641</sup> Finally, the evidence disproved any claim that the establishment and operation of trust combinations increased wages or improved the consistency of employment. In fact, trusts worsened employment conditions when they closed plants and consequently laid off workers.<sup>642</sup>

The Lexow Committee members perceived the trust problem ultimately to be a national problem for which only a federal remedy was ever likely to be wholly adequate.<sup>643</sup> In their 1897 report, however, they concluded that effective federal action had been largely thwarted by the United States Supreme Court's 1895 decision in *United States v. E.C. Knight Co.*,<sup>644</sup> which declared that the federal government did not have constitutional authority to challenge the monopolistic consolidation of sugar manufacturing.<sup>645</sup> Accordingly, the Committee declared, the state would have to act to fill the enforcement void itself.

But in fashioning a remedy, how could the legislature distinguish potentially beneficial combinations protected by the principle of freedom of contract from pernicious trusts? This could be done, the Committee stated, by scrutinizing the overall pattern of acts undertaken, even where each in isolation might have been perfectly lawful, and by judging the series of acts according to whether or not they were undertaken "for the purpose of securing an object prejudicial to public

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636. *Id.* at 39. See *supra* note 132 and accompanying text.

637. See *supra* text accompanying notes 319–20.

638. See LEXOW REPORT, *supra* note 615, at 16.

639. See *id.*

640. *Id.* at 17–18.

641. See *id.* at 16.

642. See *id.* at 17.

643. See *id.* at 30.

644. 156 U.S. 1 (1895).

645. See LEXOW REPORT, *supra* note 615, at 29, 30.

interests.”<sup>646</sup> By such an approach, lawful combinations readily could be separated from “trusts” of the sort the Committee had studied. Each of these “trusts,” the Committee found, had obtained a market share of at least eighty percent and had been formed with the purpose of gaining such market dominance by means of a combination of all the important competitors, with the ultimate aim of then limiting production and fixing prices.<sup>647</sup>

As already noted, the Lexow Committee went on to recommend new legislation to address specific bad acts committed within the state and to strengthen the state’s ability to obtain evidence. It also simultaneously considered the feasibility of a number of other possible remedies. Domestic corporate charters might “impose limitations upon the volume of stock to be issued; but in the absence of similar provisions in the laws of other States a discrimination would exist injuriously affecting domestic corporations.”<sup>648</sup> Intrastate business licenses of monopolistic foreign companies might be revoked, perhaps even in a civil action brought by a private citizen, although such a private action remedy was so “drastic” it required further study.<sup>649</sup>

In concluding its report, the Committee strongly rejected claims that “competition was ruinous to legitimate enterprise and . . . becoming obsolete”<sup>650</sup> and reiterated its central concern with the maintenance of economic opportunity. In so doing, the Committee firmly proclaimed its belief in the parallelism of fundamental political and economic liberty. The Committee declared:

Political oppression is the refusal of equal rights; commercial oppression is the denial of equal opportunities; both are repugnant to the people. The spirit that resisted the one and wrote the shibboleth of equal rights into the organic law of the nation, will not permit the other to take enduring root by tolerating the substitution of monopoly for equal opportunity. The field should be free to all. In the conflict of commercial rivalry, genius, labor and capital should have the largest liberty of expansion and employment, and the fullest opportunity of entrance into every field of industrial activity. No one should be permitted by unfair and oppressive methods to build an impregnable trocha around any industrial pursuit, and rest its claims to special privilege on abuse of power of concentrated wealth of abnormal magnitude.<sup>651</sup>

Between 1890 and 1918, at a time of such increased legislative concern and activity, the New York courts repeatedly faced restraint of trade issues in a large number of common law and statutory cases brought both before and after enactment of the Donnelly Act. These public and private cases involved both local conspiracies and some of the largest interstate combinations of the Progressive Era, including some of the combinations addressed by the United States Supreme Court in early federal antitrust litigation.<sup>652</sup> Examination of these New York cases, along with

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646. *Id.* at 34.

647. *See id.* at 34–35.

648. *Id.* at 36.

649. *See id.* at 37.

650. *Id.* at 37–38.

651. *Id.* at 38–39.

652. Thus, the “Sugar Trust” that was addressed in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), was also

contemporary antitrust opinions from Missouri, offers a revealing glimpse of an important aspect of Progressive Era state jurisprudence and an enlightening counterpoint to the familiar story of United States Supreme Court antitrust analysis during the same period. Before turning to the antitrust jurisprudence of both of these two states, however, it is important to first note briefly the rather different context of antitrust jurisprudence in Progressive Era Missouri.

### B. *Missouri and the Antitrust Crusade*

While antitrust concern played an important role in New York legislation and litigation, in Missouri such concern sparked a decades-long moral and political crusade that sought to challenge the power and legitimacy of the greatest industrial aggregations of the age.<sup>653</sup> Spurred by intense popular sentiment and journalistic agitation,<sup>654</sup> the Missouri legislature passed a series of strongly worded antitrust acts beginning in 1889.<sup>655</sup> Simultaneously, state enforcement officials actively prosecuted

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considered in *People v. North River Sugar Refining Co.*, 121 N.Y. 582, 24 N.E. 834 (1890), although at an earlier phase in the sugar combination's history. The American Tobacco combination challenged in *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), was also challenged in *People v. Duke*, 19 Misc. 292, 44 N.Y.S. 336 (Ct. Gen. Sess. 1897), and *Locker v. American Tobacco Co.*, 195 N.Y. 565, 88 N.E. 290 (1909). The national resale price maintenance system condemned in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), was earlier analyzed in *John D. Park & Sons Co. v. National Wholesale Drug. Ass'n*, 175 N.Y. 1, 67 N.E. 136 (1903).

653. Important treatments of antitrust sentiment and activity in Progressive Era Missouri include B. BRINGHURST, *ANTITRUST AND THE OIL MONOPOLY: THE STANDARD OIL CASES, 1890-1911*, at 89-107 (1979); S. PIOTT, *supra* note 437; D. THELEN, *PATHS OF RESISTANCE: TRADITION AND DIGNITY IN INDUSTRIALIZING MISSOURI* 201-31, 238-65 (1986).

654. See, e.g., S. PIOTT, *supra* note 437, at 45; D. THELEN, *supra* note 653, at 243.

655. The 1889 statute condemned commodity price fixing and output limitation as "conspiracies to defraud." Individuals could be punished by a fine of no less than \$500 and no more than \$5,000 and by imprisonment for one year in the county jail. See Act of May 18, 1889, §§ 1, 3, 1889 Mo. Laws 96. Corporations faced a fine of between one and twenty percent of their capital stock. See *id.* § 3. The act also prohibited corporate participation in combinations through use of the trust device, see *id.* § 2, declared any agreement in violation of the act to be absolutely void, see *id.* § 4, allowed purchasers to escape liability for the price of articles bought from sellers violating the statute, see *id.* § 5, and provided for the forfeiture of the charters of domestic corporations violating the act, see *id.* § 6. Finally, the new legislation required officials of all corporations doing business in the state to swear to an affidavit stating whether their corporation was part of any unlawful trust, combination, or association. See *id.* Although state constitutional problems raised by this last provision's potential for self-incrimination led to its invalidation by the Missouri Supreme Court in 1892, see *State v. Simmons Hardware Co.*, 109 Mo. 118, 18 S.W. 1125 (1892), the state legislature anticipated such difficulties in 1891 and reenacted the 1889 prohibitions with a provision granting immunity for matters disclosed in the affidavits, such affidavits now to be required annually. See Act of Apr. 2, 1891, § 8, 1891 Mo. Laws 186-89. The 1891 act simultaneously changed the authorized penalties to consist solely of a forfeiture of \$100 for each day of continued violation for both corporations and individuals and eliminated any provision for imprisonment. See *id.* § 3.

Heightened popular pressure for antitrust action as a result of economic depression in 1893, ongoing collusive fire insurance rate fixing in the state, and widespread corporate resistance to antitrust affidavit requirements prompted passage of a third statute in 1895. See S. PIOTT, *supra* note 437, at 36-40. While this statute extended the state's existing antitrust provisions to the business of fire, lightning, and storm insurance, the state insurance lobby, see *id.* at 40-41, was able to secure an exemption for collusive agreements regulating insurance rates on property situated in Missouri cities with "a population of one hundred thousand inhabitants or more," Act of Apr. 11, 1895, § 2, 1895 Mo. Laws 237-40, i.e., St. Louis and Kansas City. See S. PIOTT, *supra* note 437, at 41. The legislature simultaneously amended the statute to provide for forfeiture of the intrastate business privileges of foreign (out-of-state) corporations that violated the act, in addition to forfeiture of the charters of domestic corporate lawbreakers. See Act of Apr. 11, 1895, § 6, 1895 Mo. Laws 238. Two years later, the law was strengthened by adding new bans on exclusive dealing arrangements and agreements "designed or made with a view to lessen or which tend to lessen full and free competition in the importation, manufacture or sale of any article, product or commodity" in the state. See Act of Mar. 24, 1897, § 1a, 1897 Mo. Laws 208-09.

When the Missouri Supreme Court upheld the 1895 insurance exemption provision, see *State ex rel. Crow v. Aetna Ins. Co.*, 150 Mo. 113, 51 S.W. 413 (1898), the legislature responded yet again with new antitrust legislation in 1899,

antitrust conspiracies, not only attacking various local cartels and consolidations,<sup>656</sup> but also seeking the ouster of many of the leading interstate combinations of the time.<sup>657</sup> These actions repeatedly focused national attention on Missouri's antitrust initiatives,<sup>658</sup> and helped to spur important state and federal antitrust efforts elsewhere.<sup>659</sup> Missouri enforcement officials obtained favorable judgments in almost every one of the antitrust cases they brought,<sup>660</sup> as well as the imposition of antitrust fines in an amount comparable to the total amount of fines imposed in all federal antitrust cases during the same period.<sup>661</sup> Antitrust enforcement remained a central issue in Missouri politics throughout the years prior to the First World War, and two

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eliminating the exemption in question, *see* Act of Apr. 18, 1899, § 1, 1899 Mo. Laws 314, strengthening the state's power to compel the testimony of witnesses, *see* Act of Mar. 31, 1899, 1899 Mo. Laws 320-22; Act of May 4, 1899, 1899 Mo. Laws 318-19, and adopting new antitrust prohibitions on price fixing, output limitation, exclusive dealing, and concerted refusals to deal, *see* Act of May 10, 1899, § 1, 1899 Mo. Laws 316-17, that were designed to supplement and not repeal existing antitrust standards. *See id.* § 5. The legislation empowered the state to seek injunctive relief to enforce the new prohibitions, *see id.* § 2, and allowed private persons to sue for treble damages for injuries resulting from violations of the new act. *See id.* § 4.

Increasing popular pressure arising in part from developments in the state's case against Standard Oil prompted the legislature to adopt expanded new legislation in March of 1907. The new act retained the prohibitions of earlier legislation, although it now designated such anticompetitive conduct as conspiracies "in restraint of trade" rather than as conspiracies "to defraud." *See* Act of Mar. 19, 1907, §§ 8966-68, 8973, 8975, 1907 Mo. Laws 377, 378-79. It also added a new general prohibition extending the same conspiracy label to "any pool, trust, agreement, combination, confederation or understanding . . . in restraint of trade or competition" in any product, commodity, or article. *See id.* § 8965. While earlier public and private remedies essentially were preserved, *see id.* §§ 8970, 8972, 8974, and antitrust affidavits continued to be required, *see* Act of Mar. 20, 1907, 1907 Mo. Laws 374-77, the legislature decreed that henceforth individual violators would be guilty of a felony punishable by imprisonment not exceeding five years or a fine of between \$500 and \$5,000, or both. *See* Act of Mar. 19, 1907, § 8969, 1907 Mo. Laws 377-79. The act also authorized ouster as well as additional property forfeitures and corporate fines, without any indicated maximum, as penalties for corporate violations. *See id.* § 8971. The state legislature thereafter acted one more time to revise pre-war antitrust legislation. In 1913, it added a ban on predatory local price discrimination, *see* Act of Mar. 14, 1913, 1913 Mo. Laws 555, and declared that a prima facie case of violation of other antitrust provisions would be established if an insurance company or its agent was shown to have used in writing insurance any rate or ratebook prepared or furnished by any other person or association connected with other insurance companies. *See* Act of Mar. 29, 1913, § 10313a, 1913 Mo. Laws 549-55.

656. *See, e.g., State ex rel. Sager v. Polar Wave Ice & Fuel Co.*, 259 Mo. 578, 169 S.W. 126 (1914); *State ex rel. Barker v. Assurance Co. of Am.*, 251 Mo. 278, 158 S.W. 640 (1913); *State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 246 Mo. 168, 151 S.W. 101 (1912); *State v. Terminal R.R. Ass'n*, 182 Mo. 287, 81 S.W. 395 (1904); *State ex rel. Crow v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 52 S.W. 595 (1899).

657. *See, e.g., State ex rel. Barker v. Armour Packing Co.*, 265 Mo. 121, 176 S.W. 382 (1915); *State ex rel. Major v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S.W. 145 (1914); *State ex rel. Major v. International Harvester Co. of Am.*, 237 Mo. 369, 141 S.W. 672 (1911), *aff'd*, 234 U.S. 199 (1914); *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (1909), *aff'd sub nom. Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912); *State ex rel. Crow v. Armour Packing Co.*, 173 Mo. 356, 73 S.W. 645 (1903).

658. *See, e.g., B. BRINGHURST, supra* note 653, at 92; S. PIOTT, *supra* note 437, at 120-21; D. THELEN, *supra* note 653, at 242.

659. *See, e.g., S. PIOTT, supra* note 437, at 121-23; D. THELEN, *supra* note 653, at 243.

660. *See* cases cited *supra* in notes 656-57.

661. Federal antitrust fines amounted to \$619,965 by the close of 1914 and \$765,822 by the end of 1919. *See* Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 392 (1970). Unsuspended Missouri fines amounted to at least \$678,000 by the end of 1915. *See State ex rel. Barker v. Armour Packing Co.*, 265 Mo. 121, 176 S.W. 382 (1915) (five defendants each fined \$25,000); *State ex rel. Major v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S.W. 145 (1914) (the Yellow Pine Mfrs. Ass'n case) (four defendants fined \$50,000 each; one fined \$30,000; one fined \$25,000; one fined \$20,000; two fined \$10,000 each; one fined \$8,000; nine fined \$5,000 each; two fined \$3,000 each; and four fined \$1,000 each); *State ex rel. Major v. International Harvester Co. of Am.*, 237 Mo. 369, 141 S.W. 672 (1911) (defendant fined \$25,000); *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (1909) (three defendants each fined \$50,000), *aff'd sub nom. Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912); *State ex rel. Crow v. Armour Packing Co.*, 173 Mo. 356, 73 S.W. 645 (1903) (four defendants each fined \$5,000).

Progressive Era Missouri governors were elected to that office on the strength of their records as antitrust prosecutors.<sup>662</sup>

Missouri's most celebrated antitrust case commenced early in 1905 when Attorney General Herbert Hadley began a searching examination of the nature and methods of the Standard Oil Company. Hadley sought proof that Standard Oil of Indiana, the Waters-Pierce Oil Company, and the Republic Oil Company not only were guilty of anticompetitive collusion and predation within Missouri, but also that such activities were traceable to the companies' common control by Standard Oil of New Jersey. To obtain such proof, Hadley initiated quo warranto proceedings in the Missouri Supreme Court and began extensive hearings in both Missouri and New York that became a widely reported national sensation.<sup>663</sup>

Contemporary observers widely believed that success in the state's pathbreaking case against Standard Oil had tremendous symbolic and practical importance and that the suit raised basic issues not only of efficiency and competitive pricing, but also of economic and political opportunity and the rule of law itself.<sup>664</sup> Hadley's own importance in the eyes of Missouri citizens soared, and even before the Missouri Supreme Court rendered its decision in the case, the Republican Hadley was catapulted into the state governorship by a greater electoral victory than had ever before been achieved in the state.<sup>665</sup>

In the state's brief to the Missouri Supreme Court, Hadley forcefully articulated widely shared contemporary fears. Insisting that the outcome of the case would affect the foundations of national life as few decisions ever had before, Hadley stressed:

This case, which is now submitted for decision, is, with the possible exception of the Northern Securities case, the most important that has come before a court in this country

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662. These two were Republican Herbert Hadley, elected in 1903, and Democrat Elliott W. Major, elected in 1912. See, e.g., D. THELEN, *supra* note 653, at 250, 260.

663. To escape public hostility, Standard Oil had gone to great lengths to operate various controlled companies, including Waters-Pierce and Republic Oil, on the pretense that they in fact were independent. Republic Oil, indeed, regularly ran advertisements with such banner proclamations as "Absolutely Independent" and "No Trust." See B. BRINGHURST, *supra* note 653, at 90. To avoid admitting the truth of corporate affiliation, Standard Oil officials in New York similarly went to great lengths to avoid Hadley's process servers and, once in the New York courtroom, sought to slow Hadley's progress. See *id.* at 92-93; S. PIOTT, *supra* note 437, at 121. Henry H. Rogers, Standard Oil of Indiana's chief financial planner and a director of the company, see D. THELEN, *supra* note 653, at 242, stunned even relatively conservative observers and provoked considerable unfavorable commentary, see, e.g., S. PIOTT, *supra* note 437, at 121, when he refused even to concede that he knew the location of Standard Oil of Indiana's New York office, which happened to coincide with the address of Standard Oil of New Jersey, declaring bluntly: "It is quite immaterial to me what the Supreme Court of Missouri desires me to say . . ." See Morse, *The Taming of Rogers*, 62 AM. MAG. 227, 235 (1906). Hadley thereupon turned to the Missouri tribunal that Rogers had scorned. The Missouri Supreme Court rejected Standard Oil's claim that the question of corporate affiliation was immaterial to the quo warranto suit and ordered Standard Oil officials to respond to Hadley's inquiries. See *State ex rel. Hadley v. Standard Oil Co. of Ind.*, 194 Mo. 124, 158, 91 S.W. 1062, 1072 (1906). Whereupon, back in New York, Standard Oil officials for the first time conceded Standard Oil of New Jersey's control of Standard Oil of Indiana, Waters-Pierce, and Republic Oil, even if "for the purposes of this case only." See Morse, *supra*, at 237-38.

Hadley's two-year investigation had dramatic impact not only in Missouri. It provided a basis for state actions against Standard Oil in five other states, see D. THELEN, *supra* note 653, at 243, and federal authorities pored through Hadley's evidence before filing the Sherman Act case against Standard Oil in the United States Circuit Court for the Eastern District of Missouri in November of 1906. See S. PIOTT, *supra* note 437, at 123.

664. See S. PIOTT, *supra* note 437, at 129-30.

665. See D. THELEN, *supra* note 653, at 250.

since the Dred Scott case. It involves the decision of questions of fundamental importance in business, legislation and jurisprudence. . . .

....

History shows that the greatest danger to the existence of free institutions and the rights of the individual are the influences that come from the power wielded by combined and concentrated wealth. This power has existed at times by the assistance and through the efforts of oppressive rulers; but in the struggle of mankind for personal liberty and free and equal opportunities, he has found his most powerful and unrelenting opponent in the power which comes from wealth unlawfully secured and unfairly used.

....

. . . For the first time in its history, the greatest of these combinations is brought face to face with the law and the courts for a decision as to the legality of its plan of organization and its business methods. If upon it shall come a condemnation commensurate with the offenses of which it has been shown to be guilty, then will be accomplished more for the industrial freedom of this country—more for the protection of the individual against wrong and oppression—more for the securing of equal rights and equal opportunities—than has been accomplished by the decision of any court in the history of this commonwealth.<sup>666</sup>

It was in this setting of intensified antitrust anxiety and activity that New York and Missouri judges again turned to restraint of trade analysis after the 1890 enactment of federal antitrust legislation. While the opinions rendered in such earlier cases as *Leslie v. Lorillard* and *Skrainka v. Scharringhausen* complemented well the concerns for “excessive” or ruinous competition that were prominent in the 1880s, they potentially threatened to undermine new antitrust initiatives seeking competitive revitalization. Accordingly, a crucial question became the extent to which New York and Missouri judges would maintain or extend their recent competitive analyses or, alternatively, would proceed in a different, more traditionalist, direction more in tune with developing antitrust sentiment.

### VIII. ANTITRUST AND RESTRAINT OF TRADE THEORY AND PRACTICE IN THE STATE COURTS

Throughout the Progressive Era, state judges played an important role in the ongoing efforts to check or accommodate massive economic change. Beginning in the 1890s, at a time of greatly increased cartelization, concentration, and public apprehension, New York and Missouri judges developed antitrust and restraint of trade jurisprudence with considerably greater concern for the possible economic, moral, and political dangers of private anticompetitive behavior than they had displayed in the 1880s. In the three decades following passage of the Sherman Antitrust Act, these state jurists again and again sought to protect a traditionally conceived economic and political order from both the contemporary governmental excesses addressed in laissez-faire constitutionalism<sup>667</sup> and the private abuses targeted by antitrust legislation.<sup>668</sup> In doing so, they strongly affirmed their deep commitment to the

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666. See Statement of Facts, Brief and Argument of State of Missouri in Reply to the Briefs and Arguments of Respondents at 126–29, *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (1909).

667. See *supra* text accompanying notes 20–78, 152–97, 440–48.

668. See *supra* text accompanying notes 216–66.



interrelated principles of economic opportunity, security of property, freedom of contract, competition, and political freedom, and maintained their strong belief in the complementary ideal of nondiscretionary adjudication.

As the next two sections of this Part relate, while the New York and Missouri courts consistently continued to support efficiency-related ancillary restraints, they firmly returned to earlier nineteenth century approaches condemning nakedly anticompetitive arrangements and strongly affirmed the importance of new antitrust protections. As the succeeding section stresses, however, Progressive Era judges in New York and Missouri increasingly sought to preserve not only traditional principles, but also the economic benefits of contemporary economic innovations. Like the federal and state legislators who enacted new antitrust provisions, these state judges sought to develop approaches to skill-based predominance and to dominant, multifirm combinations that would protect both basic values and economic growth. At the same time, as the final two sections of this Part explain, these jurists repeatedly struggled to delineate the scope of basic rights, and the possible competitive consequences, implicated as well in a wide variety of concerted refusals to deal and vertical arrangements, two additional types of activity that raised basic issues of contemporary theory in a particularly striking way.

#### A. *Ancillary Restraints and the Question of General Standards*

In the decades following Sherman Act passage, New York and Missouri judges increasingly articulated an ancillary/nonancillary distinction in antitrust and restraint of trade analysis.<sup>669</sup> Indeed, they did so to a significantly greater extent than did the United States Supreme Court during the same period, and they explicitly highlighted and applauded<sup>670</sup> Judge Taft's *Addyston Pipe*<sup>671</sup> opinion in a way that the Supreme Court never did.<sup>672</sup> Approving nearly all the examples of traditional ancillary restraints coming before them,<sup>673</sup> New York courts continued to adhere to the liberalized approach established in the 1880s<sup>674</sup> and even noted with pride that English jurisprudence had lagged somewhat behind New York law in this regard.<sup>675</sup> While the Missouri Supreme Court did invalidate a restraint extending to the entire United States in 1902, it appears important that this case involved a restraint on an employee rather

669. See, e.g., *Excelsior Quilting Co. v. Creter*, 36 Misc. 698, 74 N.Y.S. 361 (Sup. Ct., Spec. Term 1902).

670. See, e.g., *State ex rel. Crow v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 41-44, 52 S.W. 595, 607 (1899); *Brett v. Ebel*, 51 N.Y.S. 573 (App. Div. 1898).

671. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899).

672. The Supreme Court did not discuss, much less adopt, Judge Taft's ancillary/nonancillary terminology when it affirmed the court of appeals' decision in the case, see *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899), nor did it ever adopt Judge Taft's approach in later cases.

673. See, e.g., *McCall v. Wright*, 198 N.Y. 143, 91 N.E. 516 (1910); *Tode v. Gross*, 127 N.Y. 480, 28 N.E. 469 (1891); *Ru Ton v. Everitt*, 54 N.Y.S. 896 (App. Div. 1898).

674. See *supra* text accompanying notes 487-511.

675. See *Ru Ton v. Everitt*, 54 N.Y.S. 896 (App. Div. 1898). The New York courts, indeed, further extended their support for ancillary arrangements by upholding covenants that were reasonably ancillary to sales of business good will where there was no accompanying transfer of physical assets. See *Wood v. Whitehead Bros. Co.*, 165 N.Y. 545, 59 N.E. 357 (1901); *Brett v. Ebel*, 51 N.Y.S. 573 (App. Div. 1898).

than on a business seller.<sup>676</sup> Missouri courts uniformly approved the ordinary ancillary restraints involved in other cases in these years;<sup>677</sup> and as noted previously, Missouri jurists not only quoted *Diamond Match* with approval but claimed that New York liberalization had lagged behind similar but earlier Missouri developments.<sup>678</sup>

Although New York and Missouri courts treated such ancillary arrangements with considerably greater sympathy than nonancillary agreements, only a distinct minority of the decided cases explicitly espoused an ancillary/nonancillary standard as a general framework for restraint of trade cases as a whole. New York cases usually did not address the question of an overarching analytic framework. Instead, analysis focused on particular statutory language<sup>679</sup> or, more frequently, on judicially-formulated doctrinal principles specifically applicable to particular types of conduct such as price fixing.<sup>680</sup> Although Missouri cases, too, usually focused primarily on more specific doctrines,<sup>681</sup> the Missouri Supreme Court did repeatedly declare general overall antitrust standards, essentially following those announced in federal antitrust jurisprudence. Thus, the Missouri court first embraced Judge Taft's *Addyston Pipe* analysis,<sup>682</sup> then later declared invalid all direct restraints,<sup>683</sup> and finally, after the middle of 1911, debated internally the nature and validity of Chief Justice White's rule of reason formula<sup>684</sup> as announced in *Standard Oil*.<sup>685</sup>

This difference in the approach of the New York and Missouri courts reflected differing perspectives on the relation between new state antitrust legislation and the common law. While New York courts characterized the Donnelly Act as essentially a codification of common law principles,<sup>686</sup> Missouri case law paralleled federal

676. See *Mallinckrodt Chem. Works v. Nemnich*, 169 Mo. 388, 69 S.W. 355 (1902).

677. See, e.g., *Glover v. Shirley*, 169 Mo. App. 637, 155 S.W. 878 (1913); *Wills v. Forester*, 140 Mo. App. 321, 124 S.W. 1090 (1910); *Angelica Jacket Co. v. Angelica*, 121 Mo. App. 226, 98 S.W. 805 (1906).

678. See *Angelica Jacket Co. v. Angelica*, 121 Mo. App. 226, 98 S.W. 805 (1906).

679. See, e.g., *Rafferty v. Buffalo City Gas Co.*, 37 A.D. 618, 56 N.Y.S. 288 (1899).

680. See, e.g., *People v. Sheldon*, 139 N.Y. 251, 34 N.E. 785 (1893). See *infra* text accompanying notes 705-06.

681. See, e.g., *State ex rel. Crow v. Armour Packing Co.*, 173 Mo. 356, 73 S.W. 645 (1903).

682. See *State ex rel. Crow v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 41-44, 52 S.W. 595, 607 (1899).

683. See *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 378-79, 116 S.W. 902, 1018-19 (1909), *aff'd sub nom. Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912).

684. In *State ex rel. Major v. International Harvester Co. of Am.*, 237 Mo. 369, 392, 141 S.W. 672, 676 (1911), the court embraced the "rule of reason" the United States Supreme Court had recently announced in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), declaring that the rule decreed an inquiry into the power for anticompetitive harm created by a combination regardless of the self-restraint the combination actually exercised. A year later, however, in *State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 246 Mo. 168, 221-22, 151 S.W. 101, 118-19 (1912), the court criticized the Supreme Court's rule of reason in *Standard Oil* as essentially *obiter dicta* not relevant to Missouri antitrust cases. The Missouri court declared that in the language of the state's antitrust law there was "no ambiguity. The statute condemns every direct restraint of trade, great or small. It closes the only door through which doubts as to its construction could enter by positively prohibiting defined combinations without regard to what the courts may think as to the extent of their effect." *Id.* at 221-22, 151 S.W. at 118. Three years later, in *State ex rel. Barker v. Armour Packing Co.*, 265 Mo. 121, 176 S.W. 382 (1915), Judge Bond, concurring in part and dissenting in part, returned to the question of the applicability of the rule of reason in Missouri antitrust litigation and declared that *International Harvester* had resolved the issue in favor of the rule's adoption. In stressing the need to give antitrust legislation a reasonable interpretation, he praised Chief Justice White's *Standard Oil* opinion, declaring:

That decision, when made, met a downpour of rant and was assailed by blasts of flatulent criticism, but, being founded on the *rock of reason*, it withstood both the rain and wind of verbosity, and emerged from the storm, in the serene light of correct thinking, as an enduring canon of legal science.

*Id.* at 178, 176 S.W. at 398 (Bond, J., concurring in part and dissenting in part).

685. 221 U.S. 1 (1911). See *supra* text accompanying notes 412-18.

686. See *In re Davies*, 168 N.Y. 89, 61 N.E. 118 (1901).

jurisprudence in declaring that Missouri antitrust legislation was a significant expansion beyond earlier common law prohibitions.<sup>687</sup> Indeed, Missouri jurists declared that despite its substantially greater specificity, Missouri antitrust legislation was in fact *in pari materia* with the Sherman Act.<sup>688</sup>

### B. *Naked Restraints and the Perceived Importance of Antitrust Law*

In both common law and statutory cases during the Progressive Era, New York and Missouri jurists consistently expressed strong support for the policies underlying contemporary antitrust legislation. As an earlier article noted at length, state judges in these years repeatedly supported state antitrust activity in the face of numerous constitutional challenges, rejecting the overwhelming majority of commerce clause, equal protection, and due process attacks mounted against state antitrust efforts.<sup>689</sup> New York and Missouri jurists expressed their firm support for antitrust philosophy not only in such constitutional analyses, but also in the consistent pattern of adjudicated decisions rendered in nonancillary restraint cases after 1890, and in explicit commentary on the contemporary dangers necessitating antitrust and restraint of trade prohibitions.

In both New York<sup>690</sup> and Missouri,<sup>691</sup> a few lower court decisions did approve particular naked, nonancillary agreements. The high courts of both states, however, uniformly and summarily condemned the nonancillary, loose arrangements that came before them<sup>692</sup> regardless of the size of the parties involved or the scope of their anticompetitive behavior.<sup>693</sup> By a wide margin, the most frequent type of nonancillary restraint to be challenged was price fixing,<sup>694</sup> although profit pool-

687. See, e.g., *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 424–25, 116 S.W. 902, 1034 (1909), *aff'd sub nom. Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912).

688. See *State ex rel. Major v. Arkansas Lumber Co.*, 260 Mo. 212, 286, 169 S.W. 126, 168 (1914).

689. See generally May, *supra* note 4.

690. See, e.g., *Kohart v. Skou*, 147 N.Y.S. 509, 510 (App. Div. 1914) (approving a price-fixing agreement among two dealers of fixtures for schools and other public buildings where the dealers did not control the supply, there was no evidence the price was “excessive,” and the agreement was formed to end a “losing and disastrous competition”); *Export Lumber Co. v. South Brooklyn Sawmill Co.*, 54 A.D. 518, 67 N.Y.S. 626 (1900) (no evidence the parties had sufficient collective market power to fix price for exported lumber or harm public).

691. See *Vandiver v. Robertson*, 125 Mo. App. 307, 102 S.W. 659 (1907) (money payment to discontinue publication of rival newspaper, not ancillary to any purchase of business or good will or to any other main transaction).

692. See, e.g., *State ex rel. Barker v. Armour Packing Co.*, 265 Mo. 121, 176 S.W. 382 (1915); *State ex rel. Major v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S.W. 145 (1914); *State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 246 Mo. 168, 151 S.W. 101 (1912); *Finck v. Schneider Granite Co.*, 187 Mo. 244, 86 S.W. 213 (1905); *State ex rel. Crow v. Armour Packing Co.*, 173 Mo. 356, 73 S.W. 645 (1903); *State ex rel. Crow v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 52 S.W. 595 (1899); *People v. Dwyer*, 215 N.Y. 46, 109 N.E. 103 (1915); *Cohen v. Berlin & Jones Envelope Co.*, 166 N.Y. 292, 59 N.E. 906 (1901); *Cummings v. Union Bluestone Co.*, 164 N.Y. 401, 58 N.E. 525 (1900); *People v. Milk Exch.*, 145 N.Y. 267, 39 N.E. 1062 (1895); *People v. Sheldon*, 139 N.Y. 251, 34 N.E. 785 (1893).

693. Many of the challenged schemes involved participants with a large collective market share. See, e.g., *State ex rel. Major v. International Harvester Co. of Am.*, 237 Mo. 369, 141 S.W. 672 (1911) (80–90%), *aff'd*, 234 U.S. 199 (1914); *State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 246 Mo. 168, 151 S.W. 101 (1912) (75–90%), *aff'd* 234 U.S. 199 (1914); *Cohen v. Berlin & Jones Envelope Co.*, 166 N.Y. 292, 59 N.E. 906 (1901) (85%). This factor was not declared to be essential, however, and anticompetitive arrangements falling short of market control were condemned, see *State ex rel. Sager v. Polar Wave Ice & Fuel Co.*, 259 Mo. 578, 169 S.W. 126 (1914) (40–50%), despite a few contrary resolutions at the lower court level, see *Export Lumber Co. v. South Brooklyn Sawmill Co.*, 54 A.D. 518, 67 N.Y.S. 626 (1900); *People v. Baff*, 98 Misc. 547, 164 N.Y.S. 709 (Ct. Gen. Sess. 1917).

694. See, e.g., *State ex rel. Major v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S.W. 145 (1914); *Euston v. Edgar*,

ing,<sup>695</sup> output limitation,<sup>696</sup> and territorial division<sup>697</sup> also were attacked. In condemning such behavior, the high courts employed the same doctrinal principles repeatedly invoked by the United States Supreme Court. It was not necessary to demonstrate an explicit anticompetitive purpose; it was sufficient that the necessary or natural effect of an arrangement was to restrain trade.<sup>698</sup> Indeed, the critical question was the power attained to restrain competition, not the actual use of that power or the effects yet generated in practice.<sup>699</sup> Complete monopoly power was not essential. It was enough that an arrangement "tended to that end."<sup>700</sup>

High court judges in Progressive Era New York and Missouri condemned such nonancillary arrangements per se. Unswayed by contemporary depictions of cartelization as legitimate self-protection, they uniformly refused to entertain any defense that prices had been set at reasonable levels,<sup>701</sup> that collective restraint was necessary to avoid ruinous competition<sup>702</sup> or, in one case, ruinous litigation,<sup>703</sup> or that such arrangements were justified because they saved the parties trouble or expense.<sup>704</sup> The rationale for such an approach was most clearly expressed by the New York Court of Appeals in the much-cited 1893 case of *People v. Sheldon*.<sup>705</sup> Alluding to the economic and moral harms of anticompetitive behavior, the court rejected a "reasonable price" justification for price fixing on the ground that

[i]f agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement were made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing.<sup>706</sup>

207 Mo. 287, 105 S.W. 773 (1907); *Finck v. Schneider Granite Co.*, 187 Mo. 244, 86 S.W. 213 (1905); *Cohen v. Berlin & Jones Envelope Co.*, 166 N.Y. 292, 59 N.E. 906 (1901); *People v. Sheldon*, 139 N.Y. 251, 34 N.E. 785 (1893).

695. See, e.g., *People v. Dwyer*, 215 N.Y. 46, 109 N.E. 103 (1915); *Judd v. Harrington*, 139 N.Y. 105, 34 N.E. 790 (1893).

696. See, e.g., *State ex rel. Major v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S.W. 145 (1914); *People v. Milk Exch.*, 145 N.Y. 267, 39 N.E. 106 (1895).

697. See, e.g., *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (1909), *aff'd sub nom. Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912).

698. See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 342 (1897); *State ex rel. Major v. Arkansas Lumber Co.*, 260 Mo. 212, 314, 169 S.W. 145, 177 (1914).

699. See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 324 (1897); *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 450, 457, 116 S.W. 902, 1043, 1045-46 (1909), *aff'd sub nom. Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912); *People v. Sheldon*, 139 N.Y. 251, 263-64, 34 N.E. 785, 789 (1893).

700. See, e.g., *Northern Sec. Co. v. United States*, 193 U.S. 197, 332 (1904); *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895); *State ex rel. Crow v. Armour Packing Co.*, 173 Mo. 356, 391, 73 S.W. 645, 653 (1903); *Judd v. Harrington*, 139 N.Y. 105, 110, 34 N.E. 790, 791 (1893).

701. See, e.g., *State ex rel. Crow v. Armour Packing Co.*, 173 Mo. 356, 388-90, 73 S.W. 645, 652 (1903); *People v. Sheldon*, 139 N.Y. 251, 264, 34 N.E. 785, 789 (1893).

702. See, e.g., *State ex rel. Major v. International Harvester Co. of Am.*, 237 Mo. 369, 391-92, 141 S.W. 672, 676 (1911); *People v. Sheldon*, 139 N.Y. 251, 262-63, 34 N.E. 785, 789 (1893).

703. See *Strait v. National Harrow Co.*, 18 N.Y.S. 224, 233-34 (Sup. Ct., Spec. Term 1891).

704. See *Judd v. Harrington*, 139 N.Y. 105, 110, 34 N.E. 790, 791 (1893). In Missouri, the high court also rejected a "good consequences" defense proffered in 1903 by leading national meat-packers who had been sued for price fixing. Rather than seeking to disprove the charges, the defendants instead largely stressed the increase in their in-state business volume over the previous 10 years, the number of persons they employed, and the wages they paid, among other economic benefits they assertedly generated. The court declared that none of these constituted any legal justification. See *State ex rel. Crow v. Armour Packing Co.*, 173 Mo. 356, 386-87, 392, 73 S.W. 645, 651-53 (1903).

705. 139 N.Y. 251, 34 N.E. 785 (1893).

706. *Id.* at 264-65, 34 N.E. at 788.

During the three decades following Sherman Act passage, New York and Missouri jurists generally treated such condemnation of naked restraints as a long-established principle that did not require extensive explanation. Rather than overruling such earlier cases as *Leslie v. Lorillard*<sup>707</sup> and *Skrainka v. Scharinghausen*,<sup>708</sup> high court jurists simply proceeded in a quite different direction without explicitly highlighting the apparent inconsistency between their new approach and the sympathy for nonancillary restraints that had been expressed in the 1880s.<sup>709</sup>

Missouri judges, unlike their New York counterparts, often discussed general questions of antitrust policy and contemporary economic change in detail, thereby clarifying the traditionalist bases of their antitrust decisions. In Missouri's very first public antitrust action, for example, brought in the late 1890s to challenge price fixing by over seventy fire insurance firms, the state high court vigorously supported antitrust enforcement efforts. Writing for the court in 1899, Judge William C. Marshall sharply condemned the defendants' activity, declaring:

In the olden times such practices were called contracts in restraint of trade. Now-a-days they are called trusts. There is no difference in the principle. There is a difference in the extent and methods. Those the courts condemned long ago were as mere saplings compared to the mammoth oaks, when considered alongside of those of to-day. When the evils to the public interests that flow from these trust combinations are attempted to be described, words become mere weaklings in their power of expression, and one stands appalled at the helplessness of the people outside of judicial aid.<sup>710</sup>

Four years later, in the state's successful quo warranto suit against the leading national meat-packing firms, Judge Marshall, again writing for the court, pointedly stressed the fundamentality of competition and starkly depicted the multiple political, economic, and social evils simultaneously produced by giant anticompetitive combinations. He explained:

"Competition is the life of trade." Pools, trusts and conspiracies to fix or maintain the prices of the necessities of life, strike at the foundation of government; instill a destructive poison into the life of the body politic; wither the energies of competitors, blight individual investments in legitimate business; drive small and honest dealers out of business for themselves, and make them mere "hewers of wood and drawers of water" for the trust; raise the cost of living and lower the price of wages; take from the average American freeman the ability to supply his family with necessary, adequate and wholesome food; force the boys away from school, and into the various branches of trade and labor, and the girls into workshops and other avenues of business, and make them breadwinners while they are yet almost infants, because the head of the house can not earn enough to feed and clothe his family.

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707. See *supra* text accompanying notes 553-64.

708. See *supra* text accompanying notes 591-601.

709. Indeed, statements from these earlier opinions declaring support for anticompetitive, nonancillary behavior occasionally did reappear in later opinions. They did so, however, in significantly different contexts and were not invoked by high court jurists to uphold arrangements thought to be equally anticompetitive. See, e.g., *Wood v. Whitehead Bros. Co.*, 165 N.Y. 545, 59 N.E. 357 (1901), discussed *supra* note 675. See also *Oakes v. Cattaraugus Water Co.*, 143 N.Y. 430, 439, 38 N.E. 461, 463 (1894).

710. *State ex rel. Crow v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 44, 52 S.W. 595, 607-08 (1899).

The people are helpless to protect themselves. The powers that be must protect them, or as surely as history records the story of republican government in Rome, so surely will the foundations of our government be shaken and its perpetuity threatened.<sup>711</sup>

In the great 1908 case of *State ex rel. Hadley v. Standard Oil Co.*,<sup>712</sup> the court reiterated that “there are few acts which individuals may engage in that are more harmful in their effects upon the interests of the public generally than trusts and combinations concerning the commodities useful to mankind.”<sup>713</sup> Quoting Judge Marshall’s graphic statement of threatened evils announced five years previously, Judge Archelaus Woodson, for the court, declared that the voluminous record in the *Standard Oil* case was “a fulfillment of the prophetic remarks” that Judge Marshall earlier had made.<sup>714</sup> Accordingly, in a decision extending to nearly 500 pages in the state reports, the court found the Standard Oil defendants guilty, ousting Standard of Indiana and Republic Oil from the state, imposing a suspended ouster against Waters-Pierce, and fining each of the three companies \$50,000.<sup>715</sup>

Vivid, if increasingly more abbreviated, allusions to the evils requiring effective antitrust relief continued in Missouri<sup>716</sup> and New York<sup>717</sup> opinions in later years. Other strains grew increasingly loud, however, as time went on.

Over time, Missouri and New York judges repeatedly were forced to confront theoretical and practical dilemmas that had been minimized or denied when new federal and state antitrust provisions were enacted. Like the congressional proponents of antitrust legislation in 1890,<sup>718</sup> Progressive Era judges in Missouri and New York maintained a strong traditional antipathy to government restrictions based solely on innocently acquired market preeminence. These judges found it increasingly difficult, however, to dismiss market-dominating, but efficient, “tight” combinations as merely another example of pernicious, abnormal interference with the beneficent processes of natural economic life.<sup>719</sup> Increasingly concerned for the possible impact of antitrust adjudication on local prosperity,<sup>720</sup> these jurists labored hard to maintain traditional principles without losing the benefits of the very combinations that traditional theory seemed to condemn.

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711. *State ex rel. Crow v. Armour Packing Co.*, 173 Mo. 356, 387, 73 S.W. 645, 652 (1903).

712. 218 Mo. 1, 116 S.W. 902 (1909). The court rendered its initial decision on Dec. 23, 1908. This initial opinion subsequently was published along with the court’s opinion on motions for rehearing and the court’s final decree in early 1909.

713. *Id.* at 381, 116 S.W. at 1019.

714. *Id.* at 462, 116 S.W. at 1047.

715. *See id.* at 464–69, 116 S.W. at 1048–50. *See also infra* text accompanying notes 735, 761–72, 793–99, 995–99.

716. *See, e.g., State ex rel. Major v. International Harvester Co. of Am.*, 237 Mo. 369, 400, 141 S.W. 672, 679 (1911).

717. *See, e.g., infra* text accompanying notes 833, 834, 1038, 1044; *see also supra* text accompanying notes 705–06 (earlier New York opinion).

718. *See supra* text accompanying notes 301–10.

719. *See supra* text accompanying notes 316–20, 637–42.

720. *See, e.g., infra* text accompanying notes 737, 751–53, 762–63, 807–10.

C. *Innocent Monopoly and the Dilemma of Efficient "Trusts"*1. *Property Rights, Freedom of Exchange, and Legitimate Market Dominance*

Contemporary constitutional and antitrust theory came together powerfully when state jurists confronted the possibility of private challenges premised purely on market predominance without any showing of improper conduct. Such a possibility implicated the broader question of the permissible bases of government regulation that had been posed by the United States Supreme Court's controversial 1877 opinion in *Munn v. Illinois*, which upheld rate regulation of Chicago grain elevators deemed to constitute a "virtual monopoly," on the ground that those businesses were "affected with a public interest."<sup>721</sup>

While Missouri jurists were appalled by what they saw as abnormal, illegitimate, and pernicious behavior on the part of powerful "trusts," they never were opposed to "bigness" per se; and they were aghast at the idea that size alone could subject private property to judicial regulation. Such concerns were made clear, for example, a year after Judge Marshall's initial praise of antitrust enforcement, when the Missouri Supreme Court resoundingly rejected a newspaper publisher's petition for a writ of mandamus to compel the Associated Press to stop its refusal to deal with the publisher.<sup>722</sup> Stressing the commercial importance of such news service reports, the publisher sought to justify its request on the ground that the Associated Press was a virtual monopoly and therefore should be deemed a public employment.<sup>723</sup>

This line of argument prompted Judge Thomas Sherwood, writing for the court, to launch into a very vigorous and quite lengthy attack<sup>724</sup> on the United States Supreme Court's decision in *Munn*. Quoting at length from the leading works of Christopher Tiedemann and Thomas M. Cooley,<sup>725</sup> Judge Sherwood firmly reasserted the fundamentality of freedom of exchange. He emphasized:

Business relations must be voluntary in order to be consistent with civil liberty. . . . In an ordinary private business relation, the State can not constitutionally interfere, whatever reason may be assigned for one's refusal to have dealings with another. It is no concern of the State or of the individual, what those reasons are. It is his constitutional right to refuse to have business relations with a particular individual, with or without reason.<sup>726</sup>

It was only where special privileges had been publicly conferred or property had been dedicated to public use that the state gained power, for example, to regulate rates. Without such elements, "no extent or magnitude of such business" could be said to affect the property "with a public interest" so as to justify its regulation.<sup>727</sup> Sharply

721. See *supra* text accompanying notes 25–27.

722. See *State ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 410, 60 S.W. 91 (1901).

723. *Id.* at 419, 60 S.W. at 93.

724. *Id.* at 424–56, 60 S.W. at 94–104.

725. *Id.* at 430–38, 60 S.W. at 96–99.

726. *Id.* at 432–33, 60 S.W. at 97 (quoting C. TIEDEMANN, *supra* note 43, § 92).

727. *Id.* at 427–28, 60 S.W. at 95.

distinguishing the American context from an earlier age of English history when "paternalism was in flower,"<sup>728</sup> Judge Sherwood stressed:

Every one is at liberty to gather news; and the fact that one has greater facilities or finances for gathering and transmitting news, or that the business has grown into one of great magnitude, wide-spread in its ramifications, or that mere incorporation has been granted a company organized for the purpose of gathering news, does not and can not of itself give the State the right to regulate what before incorporation was but a natural right.<sup>729</sup>

New York judges similarly rejected the idea that "mere size" altered the scope or vigor of private rights. Such a view was most clearly stated in an important opinion by Chief Judge Edgar Cullen of the New York Court of Appeals, concurring in a decision rejecting a private antitrust challenge to the American Tobacco Company's sole outlet distribution arrangement within New York.<sup>730</sup> Noting again the general right of each individual to decide whether or not to deal with particular other persons, Chief Judge Cullen addressed an argument urged by the New York plaintiff that echoed the Missouri mandamus petitioner's rejected line of reasoning:

It is contended, however, that a different rule should prevail where a single person or corporation controls substantially the whole production or output of a staple article. I do not think the extent of the business can affect the rights of the parties. If it is an inherent right of the owner of property to refuse to sell his property to any particular individual, he cannot be deprived of that right simply because of the magnitude of his business or his wealth. Nor do I see how the courts could well draw a line between individuals and corporations who may exercise their full right of property, and those to whom, on account of their wealth, that right is to be denied.<sup>731</sup>

## 2. *The Problem of Market Dominance Through Efficient Combination*

As noted previously, the ascendancy of tight, multifirm combinations that seemingly offered new efficiencies while simultaneously impairing economic opportunity, property rights, and competitive, free exchange posed a problem for traditional theory.<sup>732</sup> Throughout the Progressive Era, Missouri and New York jurists repeatedly confronted this problem as they sought to reassert familiar principles in the midst of economic transformation. While largely continuing to adhere to traditional political and economic perspectives, these state judges increasingly perceived economic benefits in large-scale economic operations and grew more and more uneasy about antitrust attacks on even market-dominating combinations, fearing that such attacks might impair important economic advances.

Increasing judicial commentary on the benefits of large-scale enterprise partly reflected growing state and national acceptance of an economy dominated by concentrated corporate capitalism.<sup>733</sup> In Missouri, it also reflected the factual

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728. *Id.* at 450, 60 S.W. at 103 (emphasis omitted).

729. *Id.* at 455, 60 S.W. at 104 (citation omitted).

730. See *Locker v. American Tobacco Co.*, 195 N.Y. 565, 565-68, 88 N.E. 289, 289-90 (1909) (Cullen, C.J., concurring).

731. *Id.* at 566, 88 N.E. at 289 (Cullen, C.J., concurring). For further discussion of the *Locker* case, see *infra* text accompanying notes 979-88.

732. See *supra* text accompanying notes 311-20.

733. See generally, e.g., M. SKLAR, *supra* note 1.



variations in the cases that came to the state high court for adjudication. The earliest major antitrust suits challenged simple, loose cartels not involving simultaneous productive integrations.<sup>734</sup> Although state judges frequently perceived the anticompetitive conduct challenged in later Missouri cases largely as nonancillary, cartel activity, it more frequently arose in larger settings that did involve at least arguable economic efficiencies. For example, in 1908, even as the court resoundingly condemned Standard Oil and ousted its affiliates from the state for engaging in price fixing, territorial division, and predatory pricing, the court simultaneously, if briefly, noted what a shame it was that such relief was required:

[I]f . . . such abuses as those complained of are permitted to continue untrammelled, then it would be only a question of time until they would sap the strength and patriotism from the very foundations of our government, overturn the republic, destroy our free institutions, and substitute in lieu thereof some other form of government.

. . . But it is, however, truly regrettable that such useful and beneficial institutions, when properly directed, should be guilty of such grievous misconduct and usurpation of power as to require the enforcement of the drastic legislation found upon our statutes regarding such matters; but, if not restrained in their unwise cupidity, they will inevitably pull down the temple upon their own heads, as well as upon all others who worship therein, and thereby add another incident to those where history has repeated itself.<sup>735</sup>

Three years later the court noted, in somewhat more detail, the substantial economic benefits arising from the International Harvester consolidation even while again imposing a judgment of ouster and stressing the critical difference between power acquired by combination and power as a result of size through internal growth.<sup>736</sup> The mounting policy dilemma and the difficulties of legislative remedy were noted with particular effect in this same 1911 case by Judge Franklin Ferriss, concurring in part and dissenting in part:

It cannot be doubted that combinations may be formed to create a monopoly to the injury of consumers, and yet it must be conceded that the industrial development of the country has indicated to the minds of practical men that its successful continuation requires the aggregation of capital in order to cheapen the cost of production and fully develop the possibilities of the particular industry involved. Economically, it should be to the advantage of the consumer to have the cost of production reduced to the lowest point practicable. The problem confronting the Legislature is how to secure the benefit of a lower cost of production to the consumer without permitting combinations of capital which shall result in oppression. . . .

. . . .

. . . To permit combinations to exist and at the same time secure to the people the natural and legitimate benefits of such combination is a problem not yet solved. To forbid, as the law in question does, the existence of all combinations that lessen competition compels a

734. See *State ex rel. Crow v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 52 S.W. 595 (1899); *State ex rel. Crow v. Armour Packing Co.*, 173 Mo. 356, 73 S.W. 645 (1903).

735. *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 460, 116 S.W. 902, 1046-47 (1909). The Standard Oil defendants, who previously had sought to pose as independent companies, see *supra* note 663 and accompanying text, did not assert that because they were affiliated they could not be guilty of price fixing and other group behavior in violation of antitrust law, and the court did not discuss that issue.

736. See *State ex rel. Major v. International Harvester Co. of Am.*, 237 Mo. 369, 400-02, 141 S.W. 672, 677 (1911). On the contemporary distinction between dominance through combination and dominance through single-firm skill, see also *supra* text accompanying notes 298-320.

halt in the natural march of industrial development, and deprives the people of the benefits which should result from improved business methods. However, it is the duty of the court to construe and enforce the law. In obedience to this duty I concur . . . .<sup>737</sup>

New York judges also recognized the potential benefits of tighter forms of combination even while they consistently condemned nonancillary cartel activity.<sup>738</sup> The New York Supreme Court, Special Term, for example, reflected the substantial sympathy of New York jurists for tighter consolidation<sup>739</sup> when it declared in 1900 that predictions of efficiency and price reduction gains from a particular merger were "borne out by the observed results of similar aggregations of business enterprises under one control, which has become one of the economic features of the present day."<sup>740</sup>

Ultimately, Missouri judges accommodated their desire to condemn antitrust violators with severity while simultaneously preserving the benefits of such violators' continued in-state presence through their formulation of relief. The pattern and practice of antitrust relief differed dramatically between New York and Missouri, partly because of differences in the popular and political contexts in the two states,<sup>741</sup> and partly because of a key difference in the procedural settings in which the two state high courts operated. In antitrust and restraint of trade cases, New York appellate courts considered not only the enforceability of defensively challenged contract provisions, but also the propriety of injunctive relief and criminal penalties allowed or denied by lower courts. Appellate discussion, however, was usually confined to the question of whether any injunction<sup>742</sup> or any criminal penalties<sup>743</sup> were supportable, and largely left lower courts free to establish the specific contours of relief in those cases where some remedy was justified. Only very few of the New York actions were quo warranto cases seeking corporate ouster.<sup>744</sup> The fashioning of relief even in these suits was initially a lower court concern because the New York Court of Appeals did not have original jurisdiction in such cases.<sup>745</sup> Indeed, it was held that the State of New York could not even bring such an action without an initial judicial determination that initiation of the suit would be in the public interest.<sup>746</sup>

737. *International Harvester*, 237 Mo. at 419–20, 141 S.W. at 685.

738. See *supra* text accompanying note 692.

739. See *infra* text accompanying notes 812–35.

740. *Francis v. Taylor*, 31 Misc. 187, 190, 65 N.Y.S. 28, 31 (Sup. Ct., Spec. Term 1900), *aff'd on opinion below*, 65 N.Y.S. 1133 (App. Div. 1900). See also, e.g., *Venner v. New York Cent. & H.R.R.*, 177 A.D. 296, 164 N.Y.S. 626 (1917).

741. See *supra* text accompanying notes 609–66.

742. See, e.g., *John D. Park & Sons Co. v. National Wholesale Drug. Ass'n*, 54 A.D. 223, 66 N.Y.S. 615 (1900).

743. See, e.g., *People v. Dwyer*, 215 N.Y. 46, 109 N.E. 103 (1915).

744. See, e.g., *People v. Milk Exch.*, 145 N.Y. 267, 39 N.E. 1062 (1895); *People v. American Ice Co.*, 135 A.D. 180, 120 N.Y.S. 41 (1909). The near cessation of New York actions to revoke corporate charters after the state's successful effort in *People v. North River Sugar Refining Co.*, 121 N.Y. 582, 24 N.E. 834 (1890), is noted in *NEW YORK STATE BAR*, *supra* note 436, at 41a.

745. See, e.g., *People v. North River Sugar Refining Co.*, 121 N.Y. 582, 24 N.E. 834 (1890), *aff'd* 7 N.Y.S. 406 (Sup. Ct. 1889).

746. For example, in *In re Attorney Gen. v. Consolidated Gas Co. of New York*, 124 A.D. 401, 108 N.Y.S. 823 (1908), the appellate division perceived no serious danger to be posed by a consolidation of six gas and electric companies into a new corporation and the corporation's subsequent acquisition of still further companies, and it feared

In contrast, the overwhelming majority of the leading Missouri antitrust cases of the period were quo warranto actions brought directly in the Missouri Supreme Court.<sup>747</sup> Quo warranto procedures provided Missouri jurists with a tremendous degree of flexibility and discretion in fashioning relief in particular cases.<sup>748</sup> Because the state in such actions did seek a decree of ouster, however, such litigation forced Missouri high court judges to confront the potential impact of particular corporations' discontinued intrastate presence when they considered cartel cases, as well as when they addressed litigation involving tighter consolidation. New York high court judges, on the other hand, normally were not forced to confront such a consequence so directly, at least not in cartel litigation which only sought discontinuance or punishment of bad acts and not corporate removal.

Finley Peter Dunne's fictional character, Mr. Dooley, easily could have been describing early Missouri antitrust jurisprudence when he satirized Theodore Roosevelt's ambivalence toward the rise and continued presence of the "trusts." In a famous passage, Mr. Dooley reported:

"Th' trusts," says he "are heejooous monstheres built up be th' enlightened intherprise iv th' men that have done so much to advance progress in our beloved country," he says. "On wan hand I wud stamp thim undher fut; on th' other hand not so fast."<sup>749</sup>

Missouri jurists repeatedly condemned the anticompetitive activity brought before them and firmly asserted the supremacy of the rule of law in the face of the multiple economic, social, and political evils they believed "trusts" posed to Missouri citizens.<sup>750</sup> Time and again the Missouri Supreme Court levied fines on corporate violators and adjudged their charters or intrastate business privileges forfeited. But particularly after the national financial "Panic of 1907" and the economic downturn which followed it,<sup>751</sup> progressive sentiment in both Missouri and the nation exhibited

possible public harm if the new corporation was ousted. Accordingly, over strong dissent, *see id.* at 828-30 (Laughlin, J., dissenting), the court denied the Attorney General leave to bring the action. *See infra* text accompanying notes 816-21.

747. *See, e.g., State ex rel. Barker v. Armour Packing Co.*, 265 Mo. 121, 176 S.W. 382 (1915); *State ex rel. Major v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S.W. 145 (1914); *State ex rel. Major v. International Harvester Co. of Am.*, 237 Mo. 369, 141 S.W. 672 (1911); *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (1909); *State ex rel. Crow v. Armour Packing Co.*, 173 Mo. 356, 73 S.W. 645 (1903); *State ex rel. Crow v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 52 S.W. 595 (1899).

748. Use of this procedure had a number of important implications. Contemporary constitutional law jurisprudence allowed the states broad power to revoke the charters of domestic corporations and the business licenses of out-of-state corporations in quo warranto actions. *See, e.g., May, supra* note 4, at 510-17. States, indeed, were permitted to accomplish results through quo warranto litigation that they constitutionally could not have achieved through ordinary, direct regulation. *See id.* It was, moreover, significant that the Missouri quo warranto suits were common law actions. *See, e.g., State ex rel. Major v. Arkansas Lumber Co.*, 260 Mo. 212, 290, 169 S.W. 145, 170 (1914). Antitrust legislation was relevant in such common law proceedings because the basis for seeking ouster was the abuse of charter powers or business privileges through corporate violation of state antitrust standards. *See id.* Although natural persons could not be sued in these actions along with corporations, *see id.*, common law quo warranto procedures offered state enforcers a number of advantages. For example, no right to jury trial existed, *see id.*, and there was no limit on the amount of fines that could be imposed. *See, e.g., id.; State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 476, 116 S.W. 902, 1052 (1909) (Lamm, J., concurring in part and dissenting in part, urging a \$1 million fine).

749. 2 M. SULLIVAN, OUR TIMES 411 (1940).

750. *See supra* text accompanying note 692.

751. *See, e.g., S. PIOTT, supra* note 437, at 131; D. THELEN, *supra* note 653, at 252.

increasing concern over the maintenance of economic growth and prosperity,<sup>752</sup> along with continued antipathy to anticompetitive manipulation and collusion. Increased concerns of this nature were reflected in the mounting state and national turn toward administrative, regulatory solutions.<sup>753</sup> They were also reflected in increasing disagreements among Missouri jurists on questions of relief, even as unanimity continued to prevail on questions of liability, and in the state supreme court's repeated willingness to hold decrees of ouster in suspension in order to preserve economic prosperity while ostensibly coercing future corporate good behavior under the continuing supervision of the court itself.

The developing pattern was visible even in the Missouri Supreme Court's first major quo warranto adjudication. In *State ex rel. Crow v. Firemen's Fund Insurance Co.*,<sup>754</sup> the court ousted all seventy-three corporate defendants from the state, including several companies that the court believed had not been shown to have been connected to the price-fixing conspiracy.<sup>755</sup> They, too, were liable and ousted, the court declared over dissent,<sup>756</sup> because in arguing the case they had "made common cause with the other defendants by the pleadings and joint answer."<sup>757</sup> Yet, soon thereafter the court allowed the defendants to remain in the state upon payment of \$1,000 fines.<sup>758</sup> Four years later, in *State ex rel. Crow v. Armour Packing Co.*,<sup>759</sup> national meat-packing companies were convicted of massive price fixing and formally ousted, but ouster was again suspended, this time on payment of fines of \$5,000 each.<sup>760</sup>

The *Standard Oil* litigation generated much more discussion of relief questions and possibilities, drawn out over a much longer time period. Yet, ultimately, the same pattern prevailed in this litigation as well. The court had no doubts regarding the defendants' guilt. Addressing the anticompetitive arrangements between the giant Waters-Pierce Oil Company and Standard Oil of Indiana, the court declared that "[i]f that agreement is not in restraint of trade and in violation of the letter and spirit of the anti-trust laws, then words have lost their meaning, contracts their potency, and the law its majesty."<sup>761</sup> As previously mentioned, however, the court at the same time recognized the economic benefits that such large corporations produced.<sup>762</sup> In considering the question of relief, it noted the substantiality of the financial and business interests potentially affected, conceding that "an assault made upon those vast interests is also a serious assault inflicted upon the material welfare of the State itself, by banishing so much capital therefrom and otherwise disturbing the financial

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752. See, e.g., W. LETWIN, *supra* note 167, at 250-53, 265-78; S. PIOTT, *supra* note 437, at 131-51; D. THELEN, *supra* note 653, at 252.

753. See, e.g., W. LETWIN, *supra* note 167, at 265-78; S. PIOTT, *supra* note 437, at 131-51; M. SKLAR, *supra* note 1, at 179-441; D. THELEN, *supra* note 653, at 254-65; R. WIEBE, *supra* note 199, at 145-63.

754. 152 Mo. 1, 52 S.W. 595 (1899).

755. *Id.* at 50, 52 S.W. at 609-10.

756. *Id.* at 50-51, 52 S.W. at 611-12 (Gantt, C.J., concurring in part and dissenting in part).

757. *Id.* at 50, 52 S.W. at 610.

758. See S. PIOTT, *supra* note 437, at 50.

759. 173 Mo. 356, 73 S.W. 645 (1903).

760. *Id.* at 393, 73 S.W. at 654.

761. *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 447, 116 S.W. 902, 1042 (1909).

762. See *supra* text accompanying note 735.

and business interests of the country . . . .<sup>763</sup> Nevertheless, the court declared the Waters-Pierce Oil Company's Missouri charter forfeited, along with the intrastate business privileges of Standard Oil of Indiana and Republic Oil, and fined each of the three companies \$50,000.<sup>764</sup>

A month later, Standard suggested a plan of its own to keep its in-state refinery in operation while ensuring new antimonopoly protection to Missouri citizens. Under the plan, a new corporation would be established, taking over the in-state property of Waters-Pierce and Standard Oil of Indiana. Two trustees, one picked by the state, one by Standard Oil of New Jersey, would hold all stock for four years and see that the new company did not operate illegally. The state supreme court would resolve major disagreements among the trustees.<sup>765</sup> The Missouri Supreme Court rejected this creative regulatory solution, however, in March of 1909, denying the motions for modification and rehearing made by Standard Oil of Indiana and Republic Oil.<sup>766</sup> While the exposed, and now superfluous, Republic Oil faded from independent existence,<sup>767</sup> Standard Oil of Indiana continued in operation while it appealed to the United States Supreme Court.<sup>768</sup>

In the same opinion in which it denied the foreign corporations' motions, the Missouri Supreme Court also overruled the Attorney General's request to make absolute the judgment of ouster against Waters-Pierce.<sup>769</sup> A majority of the court found suspension of ouster to be justified because Waters-Pierce had paid its fine<sup>770</sup> and passed a corporate resolution wherein it declared simply:

This company, protesting that it has never consciously or knowingly violated any of the provisions of the laws of this State, nevertheless, does hereby accept the terms and conditions of the order or decree of the Supreme Court of Missouri . . . and does hereby express its willingness to abide by the same.<sup>771</sup>

The court did, however, retain jurisdiction, reserving the power to modify or revoke its suspension of ouster if Waters-Pierce violated state antitrust law in the future.<sup>772</sup>

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763. *Standard Oil*, 218 Mo. at 460, 116 S.W. at 1046.

764. *Id.* at 465-69, 116 S.W. at 1048-50. The court ordered a temporary stay of execution as to Waters-Pierce, however, indicating that ouster would be suspended upon payment of the fine, satisfactory evidence that the company had ceased its connection with the Standard Oil combination and assurance that the company would operate lawfully in the future. *Id.* at 468-69, 116 S.W. at 1049-50. As Judge Graves noted in concurrence, revocation of the Waters-Pierce charter would have terminated the Missouri company's corporate existence, and thus in practice would have been a much more severe remedy than the revocation of intrastate privileges imposed on the two out-of-state corporations. *Id.* at 472-73, 116 S.W. at 1050 (Graves, J., concurring). This was a particularly troubling effect because at least some members of the court perceived the Missouri firm to be comparatively less guilty because its minority shareholder, Henry Clay Pierce, had protested the designs of the majority shareholder, Standard Oil of New Jersey. *Id.* at 470-73, 116 S.W. at 1050. Judge Lamm, concurring in part and dissenting in part, believed that the court should suspend the ouster of Standard Oil of Indiana as well as of Waters-Pierce, but urged that a fine of \$1 million be imposed. *Id.* at 474-76, 116 S.W. at 1052 (Lamm, J., concurring in part and dissenting in part).

765. See B. BRINGHURST, *supra* note 653, at 98.

766. See *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 477, 116 S.W. 902, 1052 (1909) (opinion on motion for rehearing).

767. See, e.g., B. BRINGHURST, *supra* note 653, at 99.

768. See, e.g., *id.*

769. See *Standard Oil*, 218 Mo. at 477, 116 S.W. at 1052.

770. *Id.*

771. *Id.* at 485, 116 S.W. at 1054 (Woodson, J., dissenting).

772. *Id.* at 478, 116 S.W. at 1052.

Two years later, while its *Standard Oil* decision remained on appeal, the Missouri Supreme Court confronted even more troubling relief issues in the 1911 case of *State ex rel. Major v. International Harvester Company of America*.<sup>773</sup> In upholding the state's challenge to the consolidation of six farm machinery companies, Chief Justice Leroy Valliant reviewed the state of the market before and after the consolidation and became troubled by the mixed pattern of negative and positive effects that he found. Consolidation had led to the elimination of manufacturer price differentials among the several brands of machinery that previously had been made by competitors but that were now all manufactured by the new International Harvester Company.<sup>774</sup> Moreover, the new company now controlled eighty to ninety percent of all harvester sales in both the United States and Missouri.<sup>775</sup> Yet, prices had essentially remained constant until 1908 and then only rose in an amount less than the increase in relevant costs over the same time period.<sup>776</sup> In addition, International Harvester had greatly increased its business and moved into production of many other types of farm equipment, thereby benefitting farmers by increasing competition in those lines. Product quality had greatly improved, and repair material had become less expensive and easier to obtain.<sup>777</sup> Overall, the court found, International Harvester had "not used its power to oppress or injure the farmers who are its customers."<sup>778</sup>

The consolidation's displacement of the fierce competition prevailing before its establishment also was not necessarily a bad development, the Chief Justice declared, because not all competition had wholesome effects:

[C]ompetition may be of such a character and so designed as to destroy the weaker competitors, leaving only the giant in the field, who then would have a monopoly of the market. The law is not interested alone in the consumer, but it has regard also for the producer and would, if it could, protect a small manufacturer or dealer from the destruction that the avarice of a powerful rival might design. Therefore, the argument of the learned counsel for the respondent is not without force, that the competition that existed in 1902 in the harvester machine market was not the kind of competition that the lawmakers had in mind when they enacted the anti-trust statutes.<sup>779</sup>

Nevertheless, the defendants still could not prevail on such a rationale, because, the court explained, "it is impossible for the Legislature to prescribe a general rule by which competition conducive to a wholesome condition of the market can be distinguished from a competition that is demoralizing and disorganizing."<sup>780</sup>

Declaring that Missouri antitrust legislation was similar to the federal antitrust act in its comprehensiveness and that it applied regardless of the particular form of contract or combination employed,<sup>781</sup> the court looked for guidance to the United

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773. 237 Mo. 369, 141 S.W. 672 (1911), *aff'd*, 234 U.S. 199 (1914).

774. *Id.* at 395, 141 S.W. at 677.

775. *Id.* at 384, 141 S.W. at 673.

776. *Id.* at 390-91, 141 S.W. at 676.

777. *Id.* at 391, 141 S.W. at 676.

778. *Id.*

779. *Id.* at 391-92, 141 S.W. at 676.

780. *Id.* at 392, 141 S.W. at 676.

781. *Id.* at 397, 141 S.W. at 678.

States Supreme Court's opinion in *Standard Oil Co. v. United States*,<sup>782</sup> which had been announced just a few months earlier. The Missouri Supreme Court concluded that under that opinion the reasonableness, and hence legality, of a challenged arrangement depended on the power or potential for competitive restriction apparent on the face of the particular contract or act.<sup>783</sup> If an excessive potential for restricting competition was created, it was irrelevant if the parties only intended to or did use it in "moderate degree."<sup>784</sup> As previously noted, in finding the defendants' combination to be unlawful under this standard, Chief Justice Valliant emphasized the traditional distinction between power legitimately resulting from internal expansion and power arising from abnormal methods. He made it clear that

[t]he statute we are now considering is not designed to limit the amount of wealth one may lawfully acquire, therefore not designed to limit the influence that wealth may exert, but it is designed to forbid the acquisition of power for the purpose of influencing the market by combinations of interests that otherwise would compete in the market. The law regards such a power acquired by such a combination as dangerous to the rights of the people and forbids its acquisition.<sup>785</sup>

If the moderate exercise of a combination's excessive power was no defense to liability, however, it nonetheless was very relevant in the formulation of appropriate relief. Chief Justice Valliant found the question of remedy a particularly difficult one, given the simultaneous presence of such benefits and potential dangers. He explained that

[a] company of so much strength has the power to temporarily reduce the price of its goods to such a degree as that all competitors would be compelled to either sell out or quit the business, and when the field by such means would be cleared the prices would be at the will of the survivor. There would be no advantage to the people in that. On the other hand it will not do to say that this company shall not, because of the superior facilities it possesses for economical manufacturing, put its products on the market at a price that other concerns possessing less facilities cannot afford, and must therefore leave the field. Nor, will it do to say that this corporation shall not buy out the smaller manufacturers and dealers, for that might be unjust to the latter, depriving them of an opportunity to sell when they so desired.<sup>786</sup>

The Chief Justice proposed to resolve this dilemma through a decree of ouster, to be suspended largely on the condition that International Harvester "not use its power either to force a competitor to sell or drive it out of the market by unfair methods, and that it . . . not raise the prices of the articles it sells beyond a fair profit on their cost and the expense of marketing the same."<sup>787</sup>

While a majority of the Missouri Supreme Court concurred in Valliant's remarks on liability, none of the other judges were willing to accept such a vague decree. Instead, a majority of the court endorsed and decreed a suspended ouster of the International Harvester Company of America, the selling arm of the consolidated

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782. 221 U.S. 1 (1911). See *supra* text accompanying notes 412–18.

783. *International Harvester*, 237 Mo. at 392–93, 141 S.W. at 676.

784. *Id.* at 393, 141 S.W. at 676.

785. *Id.* at 394, 141 S.W. at 677.

786. *Id.* at 400–01, 141 S.W. at 679.

787. *Id.* at 401, 141 S.W. at 679.

International Harvester Company, to be conditioned primarily on the former's severance from the latter, its payment of a fine, forbearance from further anticompetitive behavior, and faithful compliance with state antitrust law in the future.<sup>788</sup> The court originally set the fine at \$50,000 but subsequently reduced it on rehearing to \$25,000,<sup>789</sup> over dissenting opinions alternatively arguing that the final figure was too low<sup>790</sup> or too high.<sup>791</sup>

Although the court in 1912 affirmed the unconditional forfeiture of the charter of a Missouri corporation that had served as the mere instrument of a price-fixing agreement among Kansas City ice dealers,<sup>792</sup> it returned to its pattern of suspended ouster and ambivalent acceptance of economic concentration in 1913. In 1912 the United States Supreme Court had affirmed the Missouri court's decision in the state *Standard Oil* case and had upheld the state court's unsuspended ouster of Standard Oil of Indiana and Republic Oil.<sup>793</sup> Soon thereafter, Standard Oil of Indiana asked the court to suspend its decree of ouster, stressing the extent of the company's property investment in the state and the large number of state citizens it employed.<sup>794</sup> When the Missouri Supreme Court refused to do so in February of 1913, Standard Oil prepared to close its important refinery at Sugar Creek, near Kansas City. In response to this threat, local business leaders sought and obtained new legislation from the Missouri legislature to allow Standard Oil to stay.<sup>795</sup> Although Herbert Hadley, who had just finished his term as governor, supported the bill, believing that Waters-Pierce had been left in too dominant a position in the state,<sup>796</sup> Governor Elliot Major vetoed the special legislation.<sup>797</sup> Local Sugar Creek citizens thereupon asked the Missouri Supreme Court to reconsider its decree, and Standard Oil of Indiana again urged suspension of ouster, stressing not only the company's in-state economic importance, but also the severance of its affiliation with Standard Oil of New Jersey accomplished by the United States Supreme Court's 1911 dissolution decree in the federal case against Standard Oil.<sup>798</sup> The state supreme court responded to changing Missouri sentiment by appointing a special commissioner to look into the matter. Upon reviewing the evidence and arguments submitted on the question, the court finally did agree to suspend its decree of ouster in July of 1913. In a brief per curiam opinion supplying no explanatory rationale for its action, the state supreme court conditioned its order solely on a requirement that the company henceforth "faithfully obey and observe, in the conduct

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788. *Id.* at 417, 141 S.W. at 684-85.

789. *Id.* at 420, 141 S.W. at 685 (opinion on motion for rehearing).

790. *Id.* at 420-24, 141 S.W. at 685-87 (Graves, J., dissenting) ("If the original judgment of a fine of \$50,000 is not exceedingly reasonable, then my conservatism has indeed been warped."). *Id.* at 424, 141 S.W. at 687.

791. *Id.* at 420, 141 S.W. at 685 (Ferriss, J., concurring in part and dissenting in part). Judge Ferriss believed no fine should have been imposed.

792. See *State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 246 Mo. 168, 151 S.W. 101 (1912).

793. See *Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912).

794. See, e.g., B. BRINGHURST, *supra* note 653, at 99.

795. See *id.*

796. See, e.g., D. THELEN, *supra* note 653, at 260-61.

797. See *id.* at 261.

798. See B. BRINGHURST, *supra* note 653, at 100.



of its business, all the laws of this State, and especially the anti-trust laws of this State.”<sup>799</sup>

Five months later, the court again turned to decrees of suspended ouster, along with varying levels of fines totalling \$358,000, when it found numerous companies affiliated with the Yellow Pine Manufacturers’ Association guilty of production curtailment and price fixing through circulation of nonobjective price lists.<sup>800</sup> This time, however, the court conditioned suspension not simply on obedience to law in general, but also on compliance with a detailed list of specified conduct requirements.<sup>801</sup>

The tension between findings of liability and formal decrees of ouster on the one hand, and concerns for the practical impact of relief on the other, continued in later years and was evident as well in the Missouri Supreme Court’s final two quo warranto opinions of the Progressive Era. In *State ex rel. Sager v. Polar Wave Ice & Fuel Co.*,<sup>802</sup> the court found that incorporation of the defendant company, combining four retail and three wholesale ice dealers to gain forty to fifty percent of local business in St. Louis, violated state antitrust law.<sup>803</sup> But while the court condemned the corporation’s establishment as an unlawful restraint of trade, it simultaneously declared that the corporation’s disappearance would be too severe a loss for the court to condone. Because the seven constituent companies previously had surrendered their own charters, the court found that dissolution was not an available remedy and that ouster simply would mean losing an important competitor in the St. Louis trade.<sup>804</sup> Accordingly, the supreme court imposed a \$50,000 fine and suspended ouster on condition of future compliance with state antitrust law.<sup>805</sup>

In its final major antitrust opinion of the formative era, the Missouri Supreme Court imposed \$25,000 fines and suspended decrees of ouster against five major meat-packing firms that had joined together in an earlier and already defunct holding company<sup>806</sup> that was perceived essentially as a nonancillary restraint generating no apparent integration efficiencies. In this final case, Chief Justice Woodson, concurring, and Judge Bond, concurring in part and dissenting in part, took pains to reiterate the concern for overvigorous antitrust enforcement and the desire for economic growth that had become increasingly important during the preceding decade. Chief Justice Woodson stressed the importance of not fining the companies any more than \$25,000, particularly because they had abandoned the holding company prior to trial. He emphasized that “such institutions are absolutely necessary for the well being of the State and citizens thereof” and that “the policy of the State . . . is not to unjustly or oppressively penalize the business interests of its citizens, but . . . to protect and encourage people to come into this State, establish and conduct legitimate business

799. *State ex rel. Hadley v. Standard Oil Co.*, 251 Mo. 271, 272, 158 S.W. 601, 602 (1913).

800. *State ex rel. Major v. Arkansas Lumber Co.*, 260 Mo. 212, 317–19, 169 S.W. 145, 178–79 (1914).

801. *Id.* at 320–24, 169 S.W. at 179–80 (opinion on motions to modify judgment).

802. 259 Mo. 578, 169 S.W. 126 (1914).

803. *Id.* at 609–10, 169 S.W. at 132–34.

804. *Id.* at 616–17, 169 S.W. at 134.

805. *Id.* at 618–19, 169 S.W. at 135.

806. See *State ex rel. Barker v. Armour Packing Co.*, 265 Mo. 121, 176 S.W. 382 (1915).

herein.”<sup>807</sup> Judge Bond concluded that because the defendants faced substantial outside competition, the holding company had posed no economic threat even though it did constitute a violation of state antitrust law. Praising the United States Supreme Court’s 1911 opinion in *Standard Oil* and stressing the need to give antitrust statutes “a reasonable interpretation,” Judge Bond concluded that the “bare fact that a single ownership was in contravention of the letter of a section of the antitrust laws, is all that can be deduced from the evidence in this case.”<sup>808</sup> Accordingly, he declared:

[T]he law will be fully vindicated and the antitrust act wholesomely administered by ordering ouster of the charter of the one and revocation of the licenses of the others. Such orders to be suspended upon a showing by respondents that their present business operations are not conducted by non-competitive methods, and will not be so carried on hereafter.<sup>809</sup>

There was no just basis, Judge Bond concluded, to impose any fines in such circumstances.<sup>810</sup>

As already noted, judicial commentary on the potential benefits of large-scale economic combination did not appear in New York primarily in cases challenging alleged cartel behavior, but in the handful of suits, usually brought by minority shareholders, that sought to block particular corporate consolidations as such. Although the New York Court of Appeals did not squarely address such litigation during the three decades following Sherman Act passage, the lower courts that did do so proved to be uniformly sympathetic to the consolidations brought to their attention. In the 1899 case of *Rafferty v. Buffalo City Gas Co.*,<sup>811</sup> the Appellate Division of the New York Supreme Court rejected a minority shareholder’s challenge to a gas company’s stock acquisition of a competitor brought under the antitrust sections of the state stock corporation law.<sup>812</sup> The court declared that the arrangement did not create a monopoly because “[n]o exclusive privilege or right . . . to manufacture and sell and distribute gas is acquired”<sup>813</sup> and noted the absence of any indication that the acquired plant and properties would not actually be used.<sup>814</sup> Most broadly, the court found the acquisition legitimate despite its clear purpose to eliminate business rivalry, declaring that the purchase would not necessarily be anticompetitive:

We suppose it to be a lawful purpose of the corporation to secure itself against ruinous competition whereby its whole business may be destroyed.

. . . [I]t is urged that the effect of the contract is to prevent lawful competition. It is not necessarily so. It seems to be a contract which the directors of the Buffalo City Gas Company regard as necessary, not merely to its prosperity and for the enhancement of its

807. *Id.* at 159–60, 176 S.W. at 392 (Woodson, C.J., concurring).

808. *Id.* at 178–80, 176 S.W. at 398 (Bond, J., concurring in part and dissenting in part).

809. *Id.* at 179–80, 176 S.W. at 398 (Bond, J., concurring in part and dissenting in part).

810. *Id.* at 181, 176 S.W. at 399 (Bond, J., concurring in part and dissenting in part).

811. 37 A.D. 618, 56 N.Y.S. 288 (1899).

812. *Id.* at 621, 56 N.Y.S. at 290.

813. *Id.* at 622, 56 N.Y.S. at 290.

814. *Id.* at 622, 56 N.Y.S. at 291.

profits, but to the existence of its business. . . . A contract made to prevent or avoid destructive competition is not necessarily invalid.<sup>815</sup>

New York judges similarly failed to see any threat to competition in the consolidations that were challenged in later cases.<sup>816</sup> In 1908, for example, the appellate division refused to grant the state attorney general leave to bring an action to vacate the charter of a corporation created through the consolidation of six New York gaslight companies.<sup>817</sup> The court emphasized that no monopoly was created because the field remained open to anyone who could obtain the required approval of public authorities.<sup>818</sup> Moreover, consumers would be adequately protected against any price increases or production limitation because the industry was subject to legislative regulation in these respects.<sup>819</sup> Citing its own 1899 decision in *Rafferty* and the court of appeals' opinion in *Diamond Match*, the appellate division reiterated that "a contract or purchase of stock for the purpose of preventing competition is not of itself necessarily illegal."<sup>820</sup> The fears of local economic disruption that repeatedly led the Missouri Supreme Court to suspend decrees of ouster in quo warranto litigation led these New York judges to bar even initiation of ouster litigation against the Consolidated Gas Company:

No public purpose would . . . be served by such a judgment as the Attorney General seeks to apply for, while most serious disaster would flow from a judgment which would result in depriving the inhabitants of the city of New York of gas and electricity for lighting purposes even for a limited period. A judgment vacating the charter of the Consolidated Company would at once prevent it from carrying on the business of manufacturing and selling gas and electricity. So far as we are aware there is no other company ready to take up the business at once, and the erection and installation of the necessary plant to supply the needs of a great city would necessarily take a considerable time.<sup>821</sup>

Finally, in 1917 the same court approved a consolidation of several railway systems over the protest of a minority shareholder in *Venner v. New York Central and H.R.R.*<sup>822</sup> The appellate division stressed that the various railway systems had been commonly owned prior to the consolidation so that the new arrangement was primarily a change in the form rather than the substance of control.<sup>823</sup> It also noted the continued presence of other competitors,<sup>824</sup> the fact that the various systems

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815. *Id.* at 621-23, 56 N.Y.S. at 290-91.

816. *See, e.g.,* Francis v. Taylor, 31 Misc. 187, 65 N.Y.S. 28 (Sup. Ct., Spec. Term 1900), *aff'd on opinion below*, 52 A.D. 631, 65 N.Y.S. 1133 (1900), rejecting a minority shareholder challenge to the sale of the Wagner Palace-Car Company to the Pullman Palace-Car Company. The court again stressed that the agreement did not exclude anyone else from the business and found it likely that the sale would generate efficiencies leading to a reduction in prices charged.

817. *See In re Attorney Gen. v. Consolidated Gas Co. of New York*, 124 A.D. 401, 108 N.Y.S. 823 (1908).

818. *Id.* at 404-05, 108 N.Y.S. at 825.

819. *Id.* at 406, 408, 108 N.Y.S. at 826, 828.

820. *Id.* at 404, 108 N.Y.S. at 825.

821. *Id.* at 408-09, 108 N.Y.S. at 828. The court did not recognize any inconsistency between such an expressed fear for the difficulty of new entry and the faith it expressed earlier with regard to the potential for new entry when it found no monopoly had been created. *Id.* at 405, 108 N.Y.S. at 825.

822. 177 A.D. 296, 164 N.Y.S. 626 (1917), *aff'd*, 226 N.Y. 583, 123 N.E. 893 (1919).

823. *Id.* at 304-05, 345, 164 N.Y.S. at 631, 659.

824. *Id.* at 306-08, 164 N.Y.S. at 632-33.

primarily were complementary rather than competing lines,<sup>825</sup> and the protection against service deterioration afforded by existing public service commission regulation.<sup>826</sup>

The court believed that such a consolidation offered substantial economic benefits. It explained:

So railways, themselves, perchance, products of earlier unification, have finally become one system, whose principal arteries feed and are fed by many lines distributed in diverse directions. The due development of railways has resulted from such mergers. Nor does the prevailing thought concerning transportation question the benefit. Indeed, one cannot but know the evils to all concerned from the several ownerships of physically connecting lines, isolated in operation and segregated in control. . . . [T]he experience of all classes of people using railways is that the possible scope in distance of a bill of lading or passenger ticket should be unlimited and in inverse ratio to the proximity and accessibility of a known and an accountable carrier.<sup>827</sup>

To dissolve the consolidation, the court declared, "seems at variance with usual conceptions of public benefit, and tends to reactionary conditions that would be regarded as detrimental to the necessities of transportation, and as well subversive of essential rights of property."<sup>828</sup> In so holding, the court took pains to distinguish this consolidation from those condemned by the United States Supreme Court in *Northern Securities Co. v. United States*,<sup>829</sup> *Standard Oil Co. v. United States*,<sup>830</sup> *United States v. American Tobacco Co.*,<sup>831</sup> and *United States v. Union Pacific Railroad Co.*<sup>832</sup> The New York court distinguished those earlier arrangements largely on the basis of the repeatedly invoked, traditional distinction between normal and abnormal business conduct that had earlier been stressed, for example, by Chief Justice White in his 1911 rule of reason opinions. The appellate division explained that the arbitrary combination of competing railroads in *Northern Securities*, for instance, posed a situation where "[t]wo different things, made to be used apart, were forced into unnatural union. That was distortion."<sup>833</sup> Similarly, the court declared that in *Union Pacific*, "[t]he union of the two systems did not blend what would coalesce in ordinary and natural development, but rather two incongruous and antagonistic entities, characteristically competitive and coalescing only through compulsion."<sup>834</sup> In contrast, the activity in *Venner* "was a growth begun long since, tried through many years, and not a sudden arbitrary, conventional, unnatural, amalgamation of two diverse and inharmonious systems. It was the normal sequence of legitimate extension and expansion in necessary progress."<sup>835</sup>

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825. *Id.* at 309, 164 N.Y.S. at 634.

826. *Id.* at 312, 164 N.Y.S. at 636.

827. *Id.* at 302, 164 N.Y.S. at 629.

828. *Id.*

829. 193 U.S. 197 (1904). See *supra* text accompanying notes 410–11.

830. 221 U.S. 1 (1911). See *supra* text accompanying notes 412–18.

831. 221 U.S. 106 (1911). See *supra* text accompanying note 419.

832. 226 U.S. 61 (1912).

833. *Venner*, 177 A.D. at 319, 164 N.Y.S. at 641.

834. *Id.* at 322, 164 N.Y.S. at 643.

835. *Id.* at 323, 164 N.Y.S. at 643. On one occasion, the Missouri Supreme Court also considered a direct challenge to corporate consolidation as such. In *State ex rel. Att'y Gen. v. Terminal R.R. Ass'n*, 182 Mo. 284, 81 S.W. 395 (1904),

The traditionalist concerns reflected in state jurists' strong condemnation of naked, nonancillary agreements, and in these varied judicial reactions to tight, market-dominating combinations, reappeared strikingly in the numerous contemporary judicial analyses of concerted refusals to deal and vertical restraints. Such arrangements repeatedly raised basic issues concerning the interrelationship of economic opportunity, property rights, freedom of exchange, and the natural processes of competition. And while New York and Missouri jurists did address the more specific costs and benefits of particular challenged practices, they primarily sought to resolve cases in these final two categories of activity through purportedly "nondiscretionary" judicial techniques, in the service of a still firmly embraced traditional vision of political and economic life.

D. *Economic Rights and the Rigors of Competition: The Judicial Treatment of Concerted Refusals to Deal*

In recent years, antitrust scholars<sup>836</sup> and the United States Supreme Court<sup>837</sup> increasingly have questioned the fact that over the years various forms of collective activity have been labeled "concerted refusals to deal" or "boycotts" and frequently have been treated in similar ways despite differing competitive effects seemingly calling for differing legal treatment.<sup>838</sup> In the formative era, courts also embraced particular principles and standards for evaluating "concerted refusals to deal" in general, despite the diversity of such arrangements and the substantial differences in their potential effects. Such a unitary approach seemed more natural during the formative era than it does in the 1980s, however; for in the early twentieth century all collective refusals to deal raised similar fundamental questions of traditional theory, questions that have long ceased to have much power in antitrust jurisprudence, guided as it now is by a very different theoretical orientation.

Between 1890 and 1918, judicial consideration of collective refusals to deal expanded and changed substantially. While courts had addressed such activities earlier in the nineteenth century in a number of criminal conspiracy cases,<sup>839</sup> the possibilities for civil challenge grew considerably after 1890. The final decade of the nineteenth century and the first two decades of the twentieth century constituted the formative era not only of American antitrust law, but also of the modern, generalized theory of

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the court, in a four-to-three decision, approved a consolidation of terminal railroad corporations over a state challenge brought under a state constitutional provision prohibiting "a railroad company from consolidating with another company which owns or controls a parallel or competing line." *Id.* at 284, 81 S.W. at 395. The majority and the dissenters agreed on the importance of maintaining competitive conditions but disagreed on the consolidation's likely economic impact as well as on the correct interpretation of the relevant constitutional language.

836. See, e.g., L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 83 (1977).

837. See, e.g., *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Print. Co.*, 472 U.S. 284, 293-94 (1985).

838. For example, a "concerted refusal to deal" undertaken by a number of businesses in the same trade in order to coerce suppliers or customers to cease dealing with one or more competitors of these businesses may present an exclusionary threat not necessarily posed by a "concerted refusal" by competitors to deal with potential customers unless they accept particular terms of sale.

839. See, e.g., *People v. Fisher*, 14 Wend. 10 (N.Y. Sup. Ct. 1835). See also Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract and Tort*, 93 HARV. L. REV. 1510, 1517-18 (1980).

tortious interference with contract.<sup>840</sup> In the first half of the nineteenth century, potential tort recovery for individual or collective interference with business relations largely was limited to "enticement" actions premised on the existence of a traditional master-servant relationship<sup>841</sup> and actions charging interference through such inherently bad conduct as defamation, fraud, or coercion.<sup>842</sup> In 1853, the seminal English case of *Lumley v. Gye*<sup>843</sup> expanded tort liability to cover an executory employment contract not involving a traditional master-servant relation.<sup>844</sup> At the same time, that decision laid the foundation for the later expansion of tort liability to cover a broader range of third party interference with contracts in general.<sup>845</sup> Prior to the 1890s, however, no English or American court actually upheld a tort claim for interference with a nonemployment contract in the absence of an allegation that the defendant had engaged in traditionally recognized forms of independently wrongful conduct.<sup>846</sup>

As English and American courts broadened tort liability for both individual and collective interferences with existing and potential contract advantages, they simultaneously stressed that not all third party activities causing a breach of contract or the loss of a potential contract opportunity should be condemned.<sup>847</sup> Late nineteenth and early twentieth century judges acknowledged that legitimate competitive efforts frequently had such adverse consequences for other persons but did not wish to impede the vigor of ordinary competitive activity.<sup>848</sup> Accordingly, between 1890 and 1918, American judges in tort cases continually struggled to protect the economic rights of injured persons without impairing natural competitive activity or other legitimate conduct.<sup>849</sup>

In pursuing this goal, American jurists generally did not balance social policies and interests in the manner prominently advocated by Judge, then Justice, Oliver Wendell Holmes.<sup>850</sup> Instead, they sought to delineate more formally the boundaries of relevant, implicated rights, largely, if not invariably, by focusing on the *motive* behind the challenged conduct and its likely competitive impact.<sup>851</sup>

These ongoing, general developments in late nineteenth and early twentieth century tort doctrine paralleled and influenced contemporary antitrust analyses. Jurists in New York and Missouri generally evaluated concerted refusals to deal in largely the same manner whether they considered them as examples of possibly

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840. See generally Note, *supra* note 839.

841. See Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 336-41 (1980); Note, *supra* note 839, at 1511-16.

842. See, e.g., *Hunt v. Simonds*, 19 Mo. 583 (1854). See also Hovenkamp, *Labor Conspiracies*, *supra* note 107, at 923-24; Note, *supra* note 839, at 1516-17.

843. 2 Q.B. 216, 118 Eng. Rep. 749 (1853).

844. See Note, *supra* note 839, at 1522-23.

845. See *id.* at 1523.

846. See *id.* at 1529-30.

847. See *id.* at 1529-39.

848. See *id.* at 1532.

849. See, e.g., *infra* text accompanying notes 863-93, 896, 921-23.

850. See *Vegeahn v. Guntner*, 167 Mass. 92, 107, 44 N.E. 1077, 1080 (1896) (Holmes, J., dissenting).

851. See Dobbs, *supra* note 841, at 342; Note, *supra* note 839, at 1535-37.

tortious conduct<sup>852</sup> or as potential violations of antitrust standards.<sup>853</sup> Although the relevant New York cases directly involved tort claims, they also implicated important restraint of trade and antitrust questions. Conversely, while the Missouri cases typically involved claims based directly on state antitrust law, the Missouri courts also addressed related common law issues as well.

In the three decades following Sherman Act passage, New York and Missouri judges considered a wide variety of collective refusals to deal. In some cases, defendants sought to foreclose competitors from dealing with persons who did business with the defendants themselves. In other cases, defendants sought to coerce competitors' compliance with price-fixing agreements. In other instances, participants collectively refused to deal in order to obtain more favorable action from suppliers or purchasers. In still other cases, defendants ostensibly acted to protect the operation of organized exchange markets. Some of the cases involved collective action by laborers while others dealt only with business activity. New York and Missouri judges declared, however, that the same general principles applied whether or not labor activity was involved,<sup>854</sup> even though strikes for higher wages were deemed legitimate, while boycotts in aid of business price fixing were not.

The New York Court of Appeals set forth its most important analyses of collective refusals to deal in two labor cases decided in 1897 and 1902. In *Curran v. Galen*,<sup>855</sup> a nonunion engineer sought damages against members of a local brewery workers' assembly that was affiliated with the Knights of Labor. The assembly had entered into an agreement with the Rochester Ale Brewers Association. Under the agreement, no one was to work at any of the brewing companies in the Association for more than four weeks without becoming a member of the local assembly. When the plaintiff refused to join after working for Miller Brewing longer than the stipulated time, the defendants obtained his dismissal pursuant to the agreement and allegedly threatened to "make it impossible for him to obtain any employment" anywhere unless he relented.<sup>856</sup> In a per curiam opinion, the court acknowledged that workers had the right to organize to obtain such legitimate goals as increased wages.<sup>857</sup> It declared, however, that the plaintiff had a paramount right to pursue freely his lawful trade. Equating the issue posed by the private action of the assembly with the issue raised by the governmental restrictions addressed in contemporary constitutional jurisprudence, the court explained:

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852. See, e.g., *Dueber Watchcase Mfg. Co. v. E. Howard Watch & Clock Co.*, 3 Misc. 582, 24 N.Y.S. 647 (Sup. Ct., Spec. Term 1893).

853. See, e.g., *Walsh v. Association of Master Plumbers*, 97 Mo. App. 280, 71 S.W. 455 (1902); *Collins v. American News Co.*, 34 Misc. 260, 69 N.Y.S. 638 (Sup. Ct., Spec. Term 1901), *aff'd*, 68 A.D. 639, 74 N.Y.S. 1123 (1902).

854. See, e.g., *Walsh*, 97 Mo. App. at 289, 71 S.W. at 458; *Shinola Co. v. House of Krieg*, 75 Misc. 220, 225, 133 N.Y.S. 1015, 1018 (Sup. Ct., Spec. Term 1912); *Heim v. New York Stock Exch.*, 64 Misc. 529, 533, 118 N.Y.S. 591, 594 (Sup. Ct., Spec. Term 1909), *aff'd*, 138 A.D. 96, 122 N.Y.S. 872 (1910).

855. 152 N.Y. 33, 46 N.E. 297 (1897).

856. *Id.* at 34, 46 N.E. at 298.

857. *Id.* at 36-37, 46 N.E. at 298. As the court conceded, this right was explicitly guaranteed by statute in New York. See *id.* (citing N.Y. PENAL CODE § 170 (1895)).

Every citizen is deeply interested in the strict maintenance of the constitutional right freely to pursue a lawful avocation, under conditions equal as to all, and to enjoy the fruits of his labor, without the imposition of any conditions not required for the general welfare of the community. The candid mind should shrink from the results of the operation of the principle contended for here; for there would certainly be a compulsion, or a fettering, of the individual, glaringly at variance with that freedom in the pursuit of happiness, which is believed to be guaranteed to all by the provisions of the fundamental law of the state.<sup>858</sup>

In the court's view, such an interference with the economic liberty of other workers militated "against the spirit of our government and the nature of our institutions"<sup>859</sup> and conflicted "with that principle of public policy which prohibits monopolies and exclusive privileges."<sup>860</sup>

Five years later, the court reexamined the question of concerted refusals to deal in considerably more detail in the 1902 case of *National Protective Association of Steam Fitters and Helpers v. Cumming*.<sup>861</sup> A union had refused to allow its members to work with others who belonged to a rival labor organization and had threatened a strike unless those other workers were discharged. A majority of the court declared that neither the discharged employees nor their rival organization had any right of action against the union. Both the majority and dissenting judges agreed that each individual worker had the right to refuse to work for any particular employer and that "[w]hatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view."<sup>862</sup> The question was how to distinguish threatened refusals to work that were within the union members' rights, even though harming other workers, from refusals that were beyond those rights and unlawful. Both the majority and dissenting judges sought to resolve this question by focusing on the defendants' motives, even though Chief Judge Alton B. Parker, writing for the majority, expressed serious doubts about such a general approach for judging refusals to deal. He declared:

It seems to me illogical and little short of absurd to say that the every-day acts of the business world, apparently within the domain of competition, may be either lawful or unlawful according to the motive of the actor. If the motive be good, the act is lawful; if it be bad, the act is unlawful. Within all the authorities upholding the principle of competition, if the motive be to destroy another's business in order to secure business for yourself, the motive is good; but, according to a few recent authorities, if you do not need the business, or do not wish it, then the motive is bad; and some court may say to a jury, who are generally the triers of fact, that a given act of competition which destroyed A's business was legal if the act was prompted by a desire on the part of the defendant to secure to himself the benefit of it, but illegal if its purpose was to destroy A's business in revenge for an insult given.

But for the purpose of this discussion I shall assume this proposition to be sound, for it is clear to me that, applying that rule to the facts found, it will appear that the Appellate Division order should be sustained.<sup>863</sup>

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858. *Id.* at 37, 46 N.E. at 299.

859. *Id.* at 37, 46 N.E. at 298.

860. *Id.* at 37, 46 N.E. at 299.

861. 170 N.Y. 315, 63 N.E. 369 (1902).

862. *Id.* at 321, 338, 63 N.E. at 369, 376.

863. *Id.* at 326-27, 63 N.E. at 371-72.



In Chief Judge Parker's view, under prevailing principles, a refusal to deal fell outside the participants' lawful rights only if prompted solely by malice. More particularly, "if an organization strikes to help its members, the strike is lawful. If its purpose be merely to injure non-members, it is unlawful."<sup>864</sup> It could not be assumed that the union in this case had acted for bad reasons. Its refusal was justifiable partly on the ground that union membership required successful completion of a competency examination. Accordingly, the union's action helped to ensure the presence of careful and skilled coworkers, a particularly important consideration, Chief Judge Parker noted, at a time when the fellow servant rule continued to impede workers' recovery in tort suits against employers.<sup>865</sup> More fundamentally, however, it appeared that the union did what it did to obtain the discharge of other employees in order that its own members could have the jobs instead.<sup>866</sup> Such an aim was merely "the motive which always underlies competition" and was an entirely lawful one in both business and labor rivalry. Thus, Chief Judge Parker related:

A man has a right under the law to start a store and to sell at such reduced prices that he is able in a short time to drive the other storekeepers in his vicinity out of business, when, having possession of the trade, he finds himself soon able to recover the loss sustained while ruining the others. . . . The reason, of course, is that the doctrine has generally been accepted that free competition is worth more to society than it costs, and that, on this ground, the infliction of damages is privileged.<sup>867</sup>

Finally, it made no difference that the union announced beforehand that it would strike, because everyone had "the absolute right to threaten to do that which they had the right to do."<sup>868</sup>

Judge Gray concurred in a separate opinion, supporting the court's delineation of rights through his own succinct, if circular, statement of principle. "[M]y view," he declared, "is that the respondents had the legal right to accomplish their object by all methods not condemned by the law."<sup>869</sup>

Judge Irving Vann, writing for the three dissenters, also sought to delineate sharply the boundaries of respective rights through an examination of motive. But he drew an opposite conclusion regarding intent, and he emphasized not the rights of the union members, but those of the employer and of the discharged workers.

It was not that bad motives and effects outweighed good ones in some balancing calculus. Rather, for Judge Vann, the critical question was one of categorization. "Here we have a conspiracy to injure the plaintiffs in their business," he concluded, "as distinguished from a legitimate advancement of the defendants' own

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864. *Id.* at 326, 63 N.E. at 371.

865. *Id.* at 324-25, 63 N.E. at 370-71.

866. *Id.* at 322, 327, 63 N.E. at 370, 372.

867. *Id.* at 330, 63 N.E. at 373 (citation omitted). For an important exploration of the manner in which competition increasingly came to be recognized in nineteenth century liberal legal theory as a major form of *damnum absque injuria*, see Singer, *supra* note 83, at 1031-34.

868. *National Protective Ass'n*, 170 N.Y. at 329, 63 N.E. at 372.

869. *Id.* at 334, 63 N.E. at 374 (Gray, J., concurring). He distinguished *Curran v. Galen* on the ground that the union activity there was more harmful to the plaintiff and more malicious involving, for example, the circulation of false reports about the plaintiff. *Id.*

interests.”<sup>870</sup> The union’s coercive tactic was a “trespass upon the rights” of the nonmember workers to work for whom and on what terms they pleased.<sup>871</sup> Simultaneously, it illegitimately infringed the employer’s free choice of employees, thereby violating the employer’s inherent “right to carry on his business in any lawful way that he sees fit.”<sup>872</sup> As Judge Vann explained, everyone “has the right to the utmost freedom of contract and choice in this regard, and interference with that freedom is against public policy, because it tends not only to destroy competition, but in a broad sense, to deprive a man of both liberty and property.”<sup>873</sup>

The defendants’ activity was not within the realm of normal, privileged, competitive effort, but impeded the “law of competition and of supply and demand.”<sup>874</sup> Rather than being analogous to vigorous underselling by a business rival, it was “a tortious act” and “the same in principle as depriving a tradesman of his customers by unfair means, which has always been held a violation of law.”<sup>875</sup> Countering Judge Gray’s articulation and application of relevant principle through a similar, if opposite, declaration, Judge Vann explained that “[h]ere, the means used were illegal, because they tended and were designed to injure a man in his business, without lawful excuse.”<sup>876</sup>

Despite his declaration that employers had a right to run their businesses as they saw fit, Judge Vann conceded that workers did have the right to organize and strike to obtain better wages and conditions. Why was the strike threatened in this case not similarly legitimate as a collective effort to gain more union jobs and enhance union power to obtain better terms? To answer this question, Judge Vann returned to the question of proper categorization and emphasized the distinction between direct and indirect effects. “The object of the defendants,” Judge Vann stressed, “was not to get higher wages, shorter hours or better terms for themselves, but to prevent others from following their lawful calling.”<sup>877</sup> Quoting Arthur J. Eddy’s treatise on combinations,<sup>878</sup> he emphasized that

a threat to strike unless their wages are advanced is something very different from a threat to strike unless workmen who are not members of the combination are discharged. In either case the inconvenience and damage inflicted upon the employer is the same; but in the one case the means used are to attain a legitimate purpose, namely, the advancement of their own wages, and the injury inflicted is no more than is lawfully incidental to the enjoyment of their own legal rights. In the other case the object sought is the injury of a third party; and while it may be argued that indirectly the discharge of the non-union employee will strengthen and benefit the union and thereby indirectly benefit the union workmen, the benefit to the members

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870. *Id.* at 340, 63 N.E. at 376.

871. *Id.* at 339, 63 N.E. at 376.

872. *Id.* at 341, 63 N.E. at 376.

873. *Id.* at 341, 63 N.E. at 377 (citations omitted). To support this proposition, Judge Vann cited, in part, the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

874. *National Protective Ass’n*, 170 N.Y. at 339–40, 63 N.E. at 376.

875. *Id.* at 340–41, 63 N.E. at 377.

876. *Id.*

877. *Id.* at 342, 63 N.E. at 377.

878. 1 A. EDDY, *THE LAW OF COMBINATIONS* (1901).

of the combination is so remote, as compared to the direct and immediate injury inflicted upon the non-union workmen, that the law does not look beyond the immediate loss and damage to the innocent parties, to the remote benefits that might result to the union.<sup>879</sup>

In these same years, the New York Supreme Court, Special Term, considered a number of additional concerted refusals to deal. In a series of revealing opinions, these supreme court jurists presiding in special term sessions also sought to specify the proper boundaries of relevant rights and to delineate the factors determining the legitimacy or illegitimacy of various challenged activities. In *Dueber Watchcase Manufacturing Co. v. E. Howard Watch & Clock Co.*,<sup>880</sup> the court condemned the concerted action of various manufacturers who allegedly refused to deal with anyone who did business with the plaintiff. Accepting on demurrer that the action was taken to coerce the plaintiff's compliance with the defendants' price-fixing scheme, the court declared that the case was not one of freedom of trade or the exercise of a legal right, but instead a malicious attempt to crush a rival who refused to join in an illegal arrangement and therefore presented a case of tortious conduct for which the plaintiff could recover damages if it proved its allegations.<sup>881</sup> Eight years later, another special term opinion rejected a tort challenge to the collective conduct of several newspaper publishers who refused to deal with the plaintiff news dealer unless he would stop inserting his own competing advertising circulars in the newspapers he obtained from these publishers.<sup>882</sup> Declaring that "[w]hat any publisher could lawfully do individually all the publishers may lawfully combine to do," the court concluded that the defendants' motives were not malicious but merely self-protective.<sup>883</sup> The defendants, moreover, had not interfered with the operation of the plaintiff's own business but had merely refused to help him use the defendants' papers to injure the defendants themselves.<sup>884</sup> By way of analogy, the court declared that it would be perfectly legitimate if, in reaction to the economic or political views expressed in the defendants' newspapers, all the manufacturers of suitable paper collectively refused to sell the defendants any more paper, even if this caused the defendants great financial losses. "There is no place in any system of jurisprudence yet devised," the court explained, "for the principle that a man may be compelled to sell his goods or his labor to one with whom he does not wish to deal, merely because his refusal to do so may cause loss to him who wants them."<sup>885</sup>

In 1909 the supreme court at special term refused to enjoin the application of a New York Stock Exchange rule under which New York Stock Exchange members refused to deal with the plaintiff because he also traded on the rival Consolidated

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879. *National Protective Ass'n*, 170 N.Y. at 344-45, 63 N.E. at 378 (quoting *A. Eddy*, *supra* note 878, at 416).

880. 3 Misc. 582, 24 N.Y.S. 647 (Sup. Ct., Spec. Term 1893).

881. *Id.* at 585, 24 N.Y.S. at 649-50.

882. *See Collins v. American News Co.*, 34 Misc. 260, 69 N.Y.S. 638 (Sup. Ct., Spec. Term 1901), *aff'd*, 68 A.D. 639, 74 N.Y.S. 1123 (1902).

883. *Id.* at 263, 69 N.Y.S. at 641.

884. *Id.* at 264, 69 N.Y.S. at 642.

885. *Id.* at 265, 69 N.Y.S. at 642.

Stock Exchange.<sup>886</sup> In rejecting the plaintiff's claim that the rule constituted an illegal combination in restraint of trade, the court reiterated that

if the combination not to do business with the plaintiff is for the purpose of injuring and destroying him, it is illegal; but if injury to him follows as an incident from action sought to protect, increase and strengthen the business of the associates, then it is as legitimate as other forms of competition which the law leaves parties and combinations free to indulge in.<sup>887</sup>

The court noted that, in part, the New York Stock Exchange members simply were protecting themselves in a situation where the rival Consolidated Exchange would have had little business except for its ability to use New York Stock Exchange quotations.<sup>888</sup> At the same time, the court went on to elaborate further on the legal status of refusals to deal and declared, in contrast to the sentiments previously declared in the newspaper case, that a concerted refusal to deal that was based on personal dislike, or the plaintiff's affiliation with a "particular club, church or political organization" would be illegal, "for this would be a clear interference with his liberty and a direct attack upon him."<sup>889</sup>

Finally, in 1912 the New York Supreme Court, Special Term, addressed a concerted refusal to deal undertaken by jobbers who were seeking to obtain better terms from a manufacturer of blacking and shoe-polishing outfits.<sup>890</sup> The manufacturer sought an injunction, claiming that such activity constituted a conspiracy to injure the manufacturer's business and to injure and restrain trade.<sup>891</sup> The court denied the request, finding the jobbers' activity to be analogous to a labor strike for higher wages and "by a wide margin, within their strict legal rights,"<sup>892</sup> considering the kind of activity approved in *National Protective Association*. While the jobbers' action ultimately might lead to higher consumer prices, the court noted, this was not its primary object. The jobbers did not control the means of marketing the plaintiff's product and did not seek to boycott the plaintiff's goods in the market more generally. Finally, the court stressed that the jobbers had not engaged in fraud or any efforts to breach existing contracts and had not sought to coerce any jobber to go along with their concerted refusal to deal.<sup>893</sup>

The Missouri Supreme Court did not have occasion to address concerted refusal issues at significant length until 1908. Prior to that time, Missouri case law in the area was shaped primarily by the St. Louis and Kansas City Courts of Appeal. In 1902 the St. Louis Court of Appeals condemned as a state antitrust violation a concerted refusal to deal allegedly undertaken by a plumbers' association, along with manufacturers and dealers, for the purpose of supporting price fixing and output limitation.<sup>894</sup> The court

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886. *Heim v. New York Stock Exch.*, 64 Misc. 529, 118 N.Y.S. 591 (Sup. Ct., Spec. Term 1909), *aff'd*, 138 A.D. 96, 122 N.Y.S. 872 (1910).

887. *Id.* at 531-32, 118 N.Y.S. at 593.

888. *Id.* at 532, 118 N.Y.S. at 593.

889. *Id.* at 531, 118 N.Y.S. at 593.

890. *See Shinola Co. v. House of Krieg*, 75 Misc. 220, 133 N.Y.S. 1015 (Sup. Ct., Spec. Term 1912).

891. *Id.* at 223, 133 N.Y.S. at 1016.

892. *Id.* at 225, 133 N.Y.S. at 1018.

893. *Id.* at 224-25, 133 N.Y.S. at 1017-18.

894. *See Walsh v. Association of Master Plumbers*, 97 Mo. App. 280, 290-91, 71 S.W. 455, 458 (1902).

held that a victimized plumber who did not belong to the association could seek an injunction at common law even though state antitrust legislation did not provide for such a private remedy.<sup>895</sup> Writing for the court of appeals, Judge Bland began his analysis by setting forth the fundamental principles of potentially conflicting property rights as stated in a leading Massachusetts decision. That earlier 1871 opinion had declared:

“Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbances or annoyance. If disturbance or loss comes as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with.”<sup>896</sup>

Echoing the sentiments expressed in the New York Court of Appeals’ *National Protective Association* opinion of the same year, Judge Bland went on to note more fully the permitted consequences of competition and the analytical similarity of business and labor activity:

[C]apitalists [have] the right to combine their capital in productive enterprises and by lawful competition drive the individual producer and the smaller ones out of business [sic]. And laborers and artisans have the right to form unions and by their united effort fight competition by lawful means.<sup>897</sup>

In this case, however, what the defendants allegedly had done went beyond such limits, and the plaintiff had stated sufficient instances of malice, and indeed violence, to establish a cause of action.<sup>898</sup>

In the same year, the Kansas City Court of Appeals expanded on these principles of property and competition when it condemned a collective refusal by brewers to sell to anyone already in debt to another brewer in their group until the debt was paid.<sup>899</sup> The court declared the arrangement unlawful under state antitrust law as an agreement tending to lessen full and free competition, because indebted parties lost the benefit of competition from companies other than the brewer to whom they already owed money.<sup>900</sup> Such an agreement penalized people for a condition that was “merely unfortunate,” rather than unlawful, and took from them a “common right of citizenship.”<sup>901</sup> Once the court concluded that the brewers’ acts had the prohibited effect, it was irrelevant whether or not the brewers may have “only intended a worthy purpose.”<sup>902</sup> Accordingly, under the state antitrust statute, the defendant had a good defense when the plaintiff brewer sued on an account for beer sold, because the act declared that buyers were not liable for the price of articles purchased from companies violating state antitrust law.<sup>903</sup>

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895. *Id.* at 291–93, 71 S.W. at 458–59.

896. *Id.* at 289, 71 S.W. at 458 (quoting *Walker v. Cronin*, 107 Mass. 555, 564 (1871)).

897. *Id.*

898. *Id.* at 283–88, 293, 71 S.W. at 456, 459.

899. See *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 64, 71 S.W. 691 (1902).

900. *Id.* at 67–69, 71 S.W. at 692.

901. *Id.* at 68, 71 S.W. at 692.

902. *Id.*

903. *Id.* at 67, 71 S.W. at 692.

In so holding, the court considered at length the nature of the rights at issue and their interrelationship. Judge Ellison, for the court, noted that learned judges elsewhere sometimes had relied upon the proposition that "the lawful right of an individual, acting singly, could not become unlawful by the combined action of several to do the same thing."<sup>904</sup> "But," he declared, "there was never a greater error."<sup>905</sup> In many instances, the potentially greater dangers posed by the power in numbers justified different legal treatment. For example, a single dealer's effort to raise prices would be thwarted by competition in the "natural course of trade," while collective price fixing "interferes with trade and creates distress."<sup>906</sup>

Determination of which combinations were unlawful depended on inquiry into their character and purpose and a careful delineation of the boundaries of relevant rights. The court stated that two different rights were potentially infringed by the brewers' conduct: a public right and a right of the defendant buyer. To permit this agreement would condone more generally an agreement blocking all persons in debt from buying any of the necessities of life. Such a "disastrous" result clearly indicated that the brewers' scheme violated the public's right to unrestrained trade.<sup>907</sup> In considering the borders of the respective rights of the plaintiff and the defendant, the court began by conceding the plaintiff's right to refuse to sell. It then went on to explain the limits of that right in a striking expression of traditional theory and turn-of-the-century judicial methodology:

But defendant had the right to buy and plaintiff did not have the right to prevent others from selling to him by engaging them in a compact not to do so. For by so doing there was an invasion of defendant's right to buy. Each must exercise his right without infringing on the right of the other. Defendant can not construe his right to buy in such way as to annul plaintiff's right to refuse to sell. And neither can plaintiff stretch its right to refuse to sell so as to interfere with defendant's right to buy of others. When plaintiff sought out other dealers and procured them not to sell to defendant, it got outside its own right and invaded defendant's.<sup>908</sup>

The brewers had perverted the "natural law of trade,"<sup>909</sup> and their combination violated both common law and state antitrust prohibitions. Yet, in closing, the court conceded that a very different case might be posed by an agreement not to sell to *dishonest* debtors.<sup>910</sup>

The Kansas City court had an opportunity to address refusal to deal issues again three years later in the case of *Gladish v. Bridgeford*.<sup>911</sup> The Kansas City Live Stock Exchange expelled the plaintiff as a member for losing a customer's money and, pursuant to Exchange rules, the remaining members refused to do business with him.

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904. *Id.* at 70, 71 S.W. at 693.

905. *Id.*

906. *Id.* at 71, 71 S.W. at 693.

907. *Id.* at 73, 71 S.W. at 694.

908. *Id.* at 74, 71 S.W. at 694.

909. *Id.* at 75, 71 S.W. at 694.

910. *Id.* at 78, 71 S.W. at 696 ("The statute, while aiming to protect the public from the evils of monopoly, was not designed to offer facilities for the cheat or fraud.").

911. 113 Mo. App. 726, 89 S.W. 77 (1905).

The plaintiff sought an injunction to block Exchange efforts supporting this concerted refusal to deal, claiming it amounted to a boycott that was illegal under Missouri's 1899 antitrust statute.<sup>912</sup> The court rejected this claim on the ground that the members lacked the requisite anticompetitive intent.<sup>913</sup>

The court declared that the antitrust statute had not been intended to ban beneficial or harmless combinations. Distinguishing the brewers' agreement it previously had criticized, the court noted a number of collective refusals to deal that it concluded would be lawful and commendable. In particular, the court found laudable a posited brewers' agreement not to sell to anyone who had sold beer to minors, operated without a license, or violated Sunday closing laws, and it condoned a hypothetical druggists' refusal to sell poison except "upon the written prescription of a reputable doctor."<sup>914</sup>

The Exchange members' refusal to deal with someone expelled for dishonesty was deemed similarly praiseworthy. Indeed, if the members did otherwise, it would be perceived in commercial circles as an endorsement of the plaintiff as a trustworthy individual. By standing fast in its efforts to protect the integrity of Exchange trading, the Exchange would "inspire confidence everywhere and the tendency would be to increase and not to limit, competition and trade on the said market."<sup>915</sup>

The Missouri Supreme Court finally had an opportunity to comment on the legal status of concerted refusals to deal in two cases it decided in 1908. In *Lohse Patent Door Co. v. Fuelle*,<sup>916</sup> a carpenters' union allegedly had demanded that the plaintiff employ only union members and threatened a secondary boycott and strike against persons buying from the plaintiff. On demurrer, the court reiterated the legitimacy of labor unions and ordinary strike activity.<sup>917</sup> The court then undertook an extensive review of existing case law relevant to the treatment of secondary boycotts, quoting at considerable length from the leading cases decided by the Supreme Courts of California, Maryland, Michigan, Minnesota, New Jersey, and Wisconsin.<sup>918</sup> The court declared that these opinions, and the many other cases in the area, were all in harmony in their analyses.<sup>919</sup> The fact that an individual might have a right to refuse to deal did not necessarily validate a collective refusal. As a technical matter, only groups could constitute a conspiracy and, more fundamentally, individual refusals threatened dramatically less harm than did collective boycotts.<sup>920</sup> Judge Woodson, for the court, noted with regard to the latter that, indeed, "[t]he books are full of cases where such combinations or conspiracies have wrought great injury and loss, and even wrecked and destroyed great and powerful business institutions, and, if left untrammelled, would cause the strongest of them to fall, and the very foundation of our

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912. *Id.* at 729–33, 89 S.W. at 77–78. *See supra* note 655.

913. *Gladish*, 113 Mo. App. at 732–33, 89 S.W. at 78.

914. *Id.* at 733, 89 S.W. at 78.

915. *Id.* at 734, 89 S.W. at 79.

916. 215 Mo. 421, 114 S.W. 997 (1908).

917. *Id.* at 442–47, 114 S.W. at 1002–03. *See also* *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212, 32 S.W. 1106 (1895) (summary discussion).

918. *See Lohse Patent Door*, 215 Mo. at 447–73, 114 S.W. at 1003–12.

919. *Id.* at 473–74, 114 S.W. at 1012.

920. *Id.* at 473–74, 114 S.W. at 1012–13.

government to crumble.”<sup>921</sup> The key distinction between permissible and impermissible combinations again centered on purpose. Ordinary labor union activity was lawful because its direct purpose was protection and promotion of labor interests, and it only “indirectly and incidentally operate[d] in restraint of trade.”<sup>922</sup> Secondary boycotts of the sort under challenge, however, were unlawful because their *direct* purpose and effect was harm to the targeted business. The dismissal of nonunion workers resulting from such activity only *indirectly and incidentally* protected and benefitted the boycotters.<sup>923</sup>

In a second opinion that same year, the Missouri Supreme Court made the same distinction between individual and collective conduct and upheld on demurrer a state complaint charging the Traders Live Stock Exchange with boycott activity anticompetitively seeking to exclude nonmembers from buying and selling in their market.<sup>924</sup> The court distinguished, on such ground of alleged anticompetitive purpose and effect, the United States Supreme Court’s earlier opinion in *Anderson v. United States*,<sup>925</sup> in which the Supreme Court rejected the federal antitrust challenge to the activities of this same exchange. While the United States Supreme Court in that earlier case had found the efforts of the Exchange laudable and no threat to competition, the same could not be assumed in the state case when considered on demurrer.<sup>926</sup>

Six years later, the Missouri Supreme Court considered a private treble damage action brought under state antitrust law by a commission merchant allegedly harmed by the boycott activities of the same Traders Live Stock Exchange.<sup>927</sup> The court declared that the 1907 antitrust statute had been passed not only to restore competition and allow free play to the “old law of supply and demand,” but also “to protect the weak against the strong, or the individual against the combinations.”<sup>928</sup> The plaintiff claimed that it belonged “to the weak and individual class” and that the alleged combination was “formed solely to injure the plaintiff’s commission business.”<sup>929</sup> The court conceded that these allegations presumably were sufficient to state a cause of action at common law.<sup>930</sup> They were not enough to state a cause of action under the antitrust statute, however, where there was

no pretense that the combination charged . . . was intended to or did have any effect upon competition in the transportation of live stock to Kansas City; that it resulted or could in any manner have resulted in the restraint of trade, or was intended to or could have fixed or maintained prices . . . .<sup>931</sup>

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921. *Id.* at 474, 114 S.W. at 1013.

922. *Id.*

923. *Id.*

924. *See State ex rel. Att’y Gen. v. Kansas City Live Stock Exch.*, 211 Mo. 181, 109 S.W. 675 (1908).

925. 171 U.S. 604 (1898).

926. *Kansas City Live Stock*, 211 Mo. at 195–96, 109 S.W. at 678–79.

927. *See Co-operative Live Stock Comm. Co. v. Browning*, 260 Mo. 324, 168 S.W. 934 (1914).

928. *Id.* at 345, 168 S.W. at 938.

929. *Id.* at 347, 168 S.W. at 939.

930. *Id.* at 348, 168 S.W. at 939.

931. *Id.* at 347, 168 S.W. at 939.



The loss of a single commission merchant like the plaintiff simply could not have an appreciable impact on the vigor of overall competition in the live stock market, and the legislature would not be presumed to have intended to allow a private antitrust damage remedy in such a circumstance.<sup>932</sup>

The Missouri Supreme Court took a somewhat more critical view of concerted refusals to deal on the part of insurance companies. In *State ex rel. Barker v. Assurance Co. of America*,<sup>933</sup> the state brought quo warranto proceedings not to oust the defendants, but to fine and otherwise punish them for collectively seeking to withdraw from in-state business. The companies had entered into a boycott, refusing to write new fire insurance policies on property within the state in response to the 1913 state antitrust amendment condemning cooperative efforts in writing insurance.<sup>934</sup> The court overruled the defendants' demurrer and granted a temporary injunction,<sup>935</sup> reaffirming once again that "two or more persons have no legal right to unlawfully conspire to injure another, even though each separately had the legal right to do what the combination had agreed to do."<sup>936</sup>

Finally in 1917, the court defended the right to labor by allowing a blacklisted employee a common law cause of action against insurance companies who had agreed not to employ for two years anyone leaving employment at another of the companies in the group.<sup>937</sup>

New York and Missouri courts thus approached the varied concerted refusals to deal that they considered in generally similar ways in both labor and business contexts, and in both tort and antitrust litigation. Seeking to protect fundamental rights of labor, property, and exchange without impairing the vigor of normal competitive rivalry, New York and Missouri jurists consistently sought to delineate the proper boundaries of individual and collective rights largely through attention to the motives underlying challenged activity. They did so, moreover, even though such an approach generated varying definitions of the limits of relevant rights and at least some judicial criticism that foreshadowed the altered doctrinal analyses that American courts would widely adopt in later years.<sup>938</sup>

This judicial approach to individual and collective refusals to deal powerfully affected early analyses of various vertical agreements as well. These agreements frequently were pursued or enforced through individual or concerted refusals to deal and repeatedly raised similar questions regarding the proper scope of basic economic rights and the integrity of the natural processes of legitimate competition. It is to this final category of early state antitrust analysis that we now turn.

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932. *Id.* at 347-51, 168 S.W. at 939-40.

933. 251 Mo. 278, 158 S.W. 640 (1913).

934. *See supra* note 655.

935. *Assurance Co.*, 251 Mo. at 302, 158 S.W. at 648.

936. *Id.* at 291, 158 S.W. at 645.

937. *See Cheek v. Prudential Ins. Co. of Am.*, 192 S.W. 387 (Mo. 1917).

938. *See, e.g., Dobbs, supra* note 841, at 345; Note, *supra* note 839, at 1537-39.

### E. Vertical Restraints

During the formative era, Congress and several state legislatures enacted new legislation targeting anticompetitive vertical restraints, and vertical restrictions became the subject of recurring Progressive Era litigation. Courts in both New York and Missouri repeatedly considered challenges to sole outlet or exclusive dealing arrangements, and New York courts repeatedly considered issues posed by resale price maintenance schemes as well. The judges resolved these cases largely through a combination of competitive impact analysis and continued direct articulation of the nature and limits of rights. In analyzing such litigation, the courts emphasized a difference between a vertical restraint policy adopted by a single manufacturer and arrangements involving a horizontal combination of either manufacturers or dealers, a distinction much stressed in modern antitrust analysis.<sup>939</sup> While state judges were substantially more sympathetic to purely vertical arrangements than to horizontal schemes, the courts did not always approve the former, nor did they invariably condemn the latter. Moreover, analysis frequently was complicated by the influence of additional factors, such as copyright, patent, or trademark protection. Examination of these cases further illuminates the continuing power of traditional theory in early antitrust and restraint of trade analysis in New York and Missouri. Simultaneously, it also helps to clarify aspects of early Sherman Act case law by providing valuable additional insight into the thinking of Rufus Wheeler Peckham, the New York judge who became the chief architect of initial Supreme Court antitrust jurisprudence.

#### 1. Exclusive Dealing and Sole Outlet Arrangements

Prior to congressional enactment of section 3 of the Clayton Act in 1914,<sup>940</sup> several states, including Missouri,<sup>941</sup> adopted similar legislation to prohibit exclusive dealing when it posed a threat to competition.<sup>942</sup> The United States Supreme Court said very little on the subject of exclusive dealing during the formative era itself, considering its first Section 3 case only in 1922.<sup>943</sup> Modern Supreme Court precedent on exclusive dealing primarily began with the Court's 1949 decision in *Standard Oil Co. of California v. United States (Standard Stations)*.<sup>944</sup> In that case, the Court concluded that exclusive dealing was harmful when used to "foreclose" competition in a substantial share of a line of commerce.<sup>945</sup> Simultaneously, however, the Court also noted significant potential benefits from exclusive requirements contracts, including assurance of supply, reduction of selling expenses, protection against price fluctuation, and facilitation of long-term planning.<sup>946</sup> During the formative era itself, lower federal courts and state courts generally approved the exclusive dealing

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939. See, e.g., R. BORK, *supra* note 6, at 288.

940. Clayton Act, ch. 323, § 3, 38 Stat. 729 (1914) (codified at 15 U.S.C. § 14 (1982)).

941. See *supra* text accompanying note 655.

942. See J. DAVIES, *supra* note 252, at 184-85.

943. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922).

944. 337 U.S. 293 (1949).

945. *Id.* at 314.

946. *Id.* at 305-07.

arrangements brought to their attention,<sup>947</sup> and New York and Missouri jurists conformed to this broader pattern. When state judges upheld such agreements, however, they often justified this result on the basis of fundamental economic rights and the absence of actual or threatened harm, rather than on the ground that efficiencies had been demonstrated. Moreover, when state judges did find efficiencies to be present, these efficiencies often were of a different kind than those noted in the Supreme Court's 1949 *Standard Stations* analysis.

The closed-shop agreement in *Curran v. Galen*, discussed above,<sup>948</sup> was not the only "exclusive dealing" arrangement condemned by New York jurists. In 1893, the New York Court of Appeals declared illegal a profit-pooling and mutual exclusive dealing arrangement between an association of sheep brokers and an association of butchers.<sup>949</sup> Four years later, the Court of General Sessions for New York County upheld on demurrer the state's indictment of American Tobacco Company officers, declaring in part that it would be an unlawful conspiracy for the defendants to refuse to sell to jobbers and dealers who did not comply with exclusive dealing and resale price maintenance stipulations, if such refusal was undertaken to restrain trade and create a monopoly.<sup>950</sup> Finally, in 1910, the New York Court of Appeals declared that a telephone company's exclusive dealing arrangement with a Syracuse hotel constituted a contract in restraint of trade and that the telephone company, therefore, could not obtain an injunction to block another phone company from connecting with the hotel. The court noted that the value of telephone service rises directly with the number of people who can be reached by telephone and that exclusive dealing detrimentally blocked communication with persons served by a rival company.<sup>951</sup>

Overall, however, New York judges upheld the great majority of exclusive dealing and sole outlet arrangements coming to their attention. The New York Court of Appeals expressed its belief in the potential economic benefits of exclusive dealing as early as 1893 in an opinion that simultaneously revealed important aspects of Judge Rufus Peckham's own restraint of trade views prior to his ascension to the United States Supreme Court. In *Matthews v. Associated Press*,<sup>952</sup> Judge Peckham, for the court, upheld the defendant's imposition of an exclusive dealing requirement on its customers, reasoning that the arrangement promoted efficiency and was analogous to reasonable ancillary restraints on members of a business partnership.<sup>953</sup> Declaring that the effectiveness of a news service varies directly with its size, Judge Peckham found the Associated Press restriction an entirely "natural and reasonable restraint."<sup>954</sup> He noted:

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947. See L. SULLIVAN, *supra* note 836, § 164, at 472.

948. See *supra* text accompanying notes 855-60.

949. See *Judd v. Harrington*, 139 N.Y. 105, 34 N.E. 790 (1893).

950. See *People v. Duke*, 19 Misc. 292, 44 N.Y.S. 336 (Ct. Gen. Sess. 1897).

951. See *Central N.Y. Tel. & Tel. Co. v. Averill*, 199 N.Y. 128, 92 N.E. 206 (1910).

952. 136 N.Y. 333, 32 N.E. 981 (1893).

953. *Id.* at 340-41, 32 N.E. at 983. The Associated Press exclusive dealing requirement previously had been upheld over a challenge brought by a rival news service in *Dunlap's Cable News Co. v. Stone*, 15 N.Y.S. 2 (Sup. Ct. 1891).

954. *Matthews*, 136 N.Y. at 341, 32 N.E. at 983.

The greater the number belonging to the organization the larger will be its income and the greater amount it will be able to spend for making the collection of news and the more efficient and valuable such collection will be. . . . [I]t would seem most appropriate to provide that the members of such association should not take news from any other. The division of the business among two or more associations tends directly towards the making of the membership in each less valuable than it otherwise would be, and the membership being less valuable the association itself would tend to decrease in members and to grow less efficient in service and less capable of fulfilling promptly one of the great objects of its existence, the procuring and supplying of news to its members.<sup>955</sup>

In so holding, Judge Peckham noted the striking recent shifts in judicial opinion in New York and elsewhere and summarized common law restraint of trade doctrine in a manner that varied significantly from the famous summary he later would announce as a United States Supreme Court Justice. Explaining recent developments in a way that simultaneously reflected the absence of any "reasonableness" test for nonancillary restraints in traditional nineteenth century New York case law, Judge Peckham declared:

The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. The courts do not go to the length of saying that contracts which they now would say are in restraint of trade are, nevertheless, valid contracts, and to be enforced; they do, however, now hold many contracts not open to the objection that they are in restraint of trade which a few years back would have been avoided on that sole ground, both here and in England.<sup>956</sup>

Four years later, in the United States Supreme Court, when Justices Peckham and White first articulated their differing approaches to Sherman Act interpretation, they both looked to the common law to determine what Congress intended when it banned "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce."<sup>957</sup> In *United States v. Trans-Missouri Freight Association*,<sup>958</sup> both Justices conceded that state courts had not always invalidated agreements that were challenged on restraint of trade grounds; but they disagreed with regard to common law terminology. Justice White, dissenting, declared that common law courts decided through judicial reasoning whether or not a particular arrangement was an unreasonable private regulation of commerce. If it was, it was held unenforceable as a "restraint of trade." If it was not, it would be upheld and would not receive that label of condemnation.<sup>959</sup> Accordingly, Sherman Act analysis in each case would have to consist of judicial evaluation of reasonableness or unreasonableness to decide if challenged agreements were "restraints of trade" and therefore prohibited under the

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955. *Id.*

956. *Id.* at 340, 32 N.E. at 982-83. As examples of the recent, more tolerant judicial trend in New York, Judge Peckham cited *Diamond Match Co. v. Roeber*, 106 N.Y. 473, 13 N.E. 418 (1887); *Hodge v. Sloan*, 107 N.Y. 244, 17 N.E. 335 (1887); and *Leslie v. Lorillard*, 110 N.Y. 519, 18 N.E. 363 (1888). Judge Peckham had dissented without a written opinion in *Diamond Match* and had not voted in *Hodge*. For a discussion of these three cases, see *supra* text accompanying notes 487-506, 508-11, 553-64.

957. Sherman Antitrust Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (1982)).

958. 166 U.S. 290 (1897). See *supra* text accompanying notes 397-405.

959. *Id.* at 346-47 (White, J., dissenting).

statute when interstate commerce was involved.<sup>960</sup> Such an analysis, Justice White declared, would lead to approval of conduct like the cooperative rate-setting activity before the Court, which, in his view, “simply provide[d] for uniform classification, and [sought] to prevent secret or sudden changes in the published rates,”<sup>961</sup> results he believed to be of great benefit to the public.<sup>962</sup> In reviewing common law terminology to support his advocated approach to Sherman Act analysis, Justice White quoted various state cases indicating that only invalidated agreements had been labeled “restraints of trade.”<sup>963</sup> It is perhaps understandable that he found the description of common law terminology in Justice Peckham’s majority opinion somewhat surprising; for the common law case on which Justice White chiefly relied was the New York Court of Appeals opinion in *Matthews* that Justice Peckham himself had written only four years earlier.<sup>964</sup>

In contrast to his prior description of common law phraseology, Justice Peckham in *Trans-Missouri Freight Association* now declared:

Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. *A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere.* By the simple use of the term “contract in restraint of trade,” all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exceptions or limitation can be added without placing in the act that which has been omitted by Congress.<sup>965</sup>

Disturbed by both the practical and jurisprudential implications of Justice White’s approach, Justice Peckham thus embraced a view of common law restraint of trade terminology that contradicted his own earlier views as a state court judge. Justice White’s position in *Trans-Missouri Freight Association* alerted Justice Peckham to the fact that his earlier view of common law terminology, limiting “restraints of trade” to judicially invalidated agreements, readily could be adapted to a judicial approach under the Sherman Act condoning quite anticompetitive results. The revised view of common law terminology that Justice Peckham accepted in *Trans-Missouri Freight Association* broadened the sweep of the federal antitrust act to condemn “reasonable” and “unreasonable” restraints alike, and thereby made it more difficult to uphold the conduct that Justice White would have validated. As previously noted, in

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960. *Id.* at 353–54 (White, J., dissenting).

961. *Id.* at 371 (White, J., dissenting).

962. *Id.* at 367–68 (White, J., dissenting).

963. *Id.* at 347–50 (White, J., dissenting).

964. *See id.* at 348–49 (White, J., dissenting).

965. *Id.* at 328 (emphasis added) (Peckham, J., for the Court).

adopting this interpretation of statutory language, Justice Peckham had no desire to impede normal economic activity. Instead, he merely sought to protect more effectively the natural processes of economic life, through an ostensibly less discretionary test focused not on "reasonableness" but on "directness."<sup>966</sup>

A year after the *Matthews* decision was announced, Judge Peckham dissented without written opinion from a New York Court of Appeals decision approving another, rather different exclusive dealing arrangement.<sup>967</sup> In *Lough v. Outerbridge*,<sup>968</sup> a steamship company concerned with intermittent competition from a particular British steamer carrying cargo from New York to Barbados responded by offering a special reduced rate to merchants agreeing to ship exclusively through the defendant company whenever the British ship was in New York taking on cargo. The plaintiff commission merchants sued, asking the court to compel the defendant to grant them the special lower price despite their refusal to abide by the exclusive dealing requirement.<sup>969</sup> This the court refused to do.

The court stressed that the defendants at all times offered to ship the plaintiff's goods at the regular forty cents per dry barrel price, which the trial judge had found to be a reasonable rate.<sup>970</sup> The defendants therefore had fulfilled their public obligation as common carriers and were not required to allow the plaintiffs the special, unprofitable rate of twenty-five cents if the plaintiffs refused to comply with the conditions the defendants stipulated.<sup>971</sup> The court found irrelevant the plaintiffs' contention that they were the only shippers of goods from New York to Barbados employing the British ship and that the defendants' purpose was "to suppress competition in the business, and to retain a monopoly for their own benefit."<sup>972</sup> The trial court had not found this contention to be true. Moreover, even if it were true, the defendants' behavior would not have been unlawful or prejudicial to the public:

The purpose of an act which in itself is perfectly lawful or, under all the circumstances, reasonable, is seldom, if ever, material. . . . When the service is performed for a reasonable and just hire the public have no interest in the question whether one or many are engaged in it. The monopoly which the law views with disfavor is the manipulation of a business in which the public are interested in such a way as to enable one or a few to control and regulate it in their own interest and to the detriment of the public by exacting unreasonable charges. . . . I cannot perceive anything unlawful or against the public good in seeking by such means to retain a business which it does not appear was of sufficient magnitude to furnish employment for both lines.<sup>973</sup>

In subsequent cases, the lower New York courts repeatedly upheld sole outlet or exclusive dealing arrangements brought before them, despite the absence of any common carrier issues of the sort present in *Lough v. Outerbridge*. The most explicit

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966. See *supra* text accompanying notes 420-21.

967. See *Lough v. Outerbridge*, 143 N.Y. 271, 284, 38 N.E. 292, 296 (1894).

968. 143 N.Y. 271, 38 N.E. 292 (1894).

969. *Id.* at 273-78, 38 N.E. at 293-94.

970. *Id.* at 276, 38 N.E. at 294.

971. *Id.* at 279-80, 38 N.E. at 295.

972. *Id.* at 282, 38 N.E. at 296.

973. *Id.* at 282-83, 38 N.E. at 296 (citations omitted).

attempt to address such agreements within a broader, overall framework of restraint of trade analysis came in the 1902 New York Supreme Court, Special Term case of *Excelsior Quilting Co. v. Creter*.<sup>974</sup> In that case, the sole manufacturer of a quilting machine had sold to the plaintiff all eight machines it had on hand and had agreed not to build any more for use anywhere in the United States or Canada, except Washington State. The court noted that restraint of trade cases seemed to fall into two groups: invalid horizontal combinations to regulate a market, and generally valid covenants by a seller not to compete with the buyer of the seller's business.<sup>975</sup> The court noted that the agreement before it really did not fall into either category and was "really one of individual right, with which the question of public policy has little, if anything, to do."<sup>976</sup> Nevertheless, it found the ancillary restraint reasoning and economic analysis of *Diamond Match Co. v. Roeber* to be persuasive and controlling. No threat to competition was posed because the patents on the machines in question had expired long ago, and the relevant designs could be obtained by any manufacturer who wanted to manufacture the equipment.<sup>977</sup> Accordingly, the challenged arrangement fell not into the prohibited category of invalid restraint of trade, but instead into the protected realm of freedom of contract.<sup>978</sup>

Five years later, the Appellate Division of the New York Supreme Court upheld another sole outlet arrangement in an important decision subsequently affirmed by the court of appeals on the basis of the appellate division opinions. In *Locker v. American Tobacco Co.*,<sup>979</sup> the appellate division rejected a common law and Donnelly Act challenge to the American Tobacco Company's use of the Metropolitan Tobacco Company as its sole sales agent in greater New York City.<sup>980</sup> The action had been brought by an independent jobber who had not been allowed to purchase tobacco products from either of these two companies, which allegedly controlled ninety percent of the local market.<sup>981</sup> The court emphasized that the plaintiff had not alleged that incorporation of the defendant companies was itself unlawful or that any horizontal combination of competitors was involved.<sup>982</sup> In such circumstances, the arrangement in question could not be condemned as economically pernicious or beyond the scope of individual rights. Stressing the critical difference between purely vertical and horizontal arrangements, the court noted:

The corporate defendants are not, and could not under any circumstances, be competitors; the one is a producer and manufacturer; the other a non-producing and nonmanufacturing wholesale and retail dealer. The producer may lawfully sell or refuse to sell to any person; may establish the sales price and terms of sale of its products, and what it may lawfully do

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974. 36 Misc. 698, 74 N.Y.S. 361 (Sup. Ct., Spec. Term 1902).

975. *Id.* at 699-701, 74 N.Y.S. at 361-62.

976. *Id.* at 700, 74 N.Y.S. at 362.

977. *Id.*

978. *Id.* at 706, 74 N.Y.S. at 364 ("The general trade must not be restrained, but the greatest freedom of contract between individuals, acting within the law, should be assured, so that business may not be trammelled by unnecessary restrictions.").

979. 121 A.D. 443, 106 N.Y.S. 115 (1907), *aff'd on opinions below*, 195 N.Y. 565, 88 N.E. 289 (1909).

980. *Id.* at 450-52, 106 N.Y.S. at 119-20.

981. *Id.* at 445-47, 106 N.Y.S. at 116-17.

982. *Id.* at 450-52, 106 N.Y.S. at 119-20.

itself it may lawfully delegate to another, and the exercise of such delegated power by the other is as lawful as if exercised by the producer itself. If the producer has a monopoly of its products, the selling through a sales agent adds nothing to it. If it has not such monopoly, the fact of selling its products through a sales agent is the mere marketing thereof, and does not create a monopoly. If, therefore, vice existed in this agreement or arrangement, it must be predicated on its results, namely, the refusal by the Metropolitan Company, through the exercise of its power as a sales agent, with the knowledge of its principal, to sell the products of the latter to the plaintiffs to their inconvenience and damage.<sup>983</sup>

Such an individual refusal to deal was beyond challenge, however, and a matter of fundamental right. Indeed, where an individual, as opposed to concerted, refusal to deal was at issue the action was legitimate regardless of its motivation:

The complaint evidently proceeds upon the theory that the plaintiffs are vested with the legal right to buy and deal in the merchandise manufactured and controlled by the defendants . . . and that a refusal to sell to them is a wrongful and actionable invasion of such right; but we are unable to discover in this record anything warranting or sustaining such theory. It is the well-settled law of this State that the refusal to maintain trade relations with any individual is an inherent right which every person may exercise lawfully, for reasons he deems sufficient or for no reasons whatever, and it is immaterial whether such refusal is based upon reason or is the result of mere caprice, prejudice or malice. It is a part of the liberty of action which the Constitutions, State and Federal, guarantee to the citizen.<sup>984</sup>

As already noted, when the court of appeals affirmed the decision in 1909,<sup>985</sup> Chief Judge Cullen added a separate concurrence strongly endorsing such a view of inherent rights and stressed that such rights did not vary with the size or power of an individual or corporation.<sup>986</sup> The arrangement in *Locker*, Chief Judge Cullen emphasized, was a case of individual and not collective refusal, and this made all the difference. "A refusal to sell to any particular individual," he declared,

becomes illegal only when it is done in pursuance of a combination with other owners to injure the individual with whom they refuse to deal. In other words, it is the combination of several persons which makes that action illegal which, if done by a single person without any agreement for joint action, would be legal.<sup>987</sup>

The fact that rights retained their vitality even for corporations of enormous size and strength did not need to be cause for public alarm, in Chief Judge Cullen's view. The state possessed ample authority to deal with any problems that might arise, through its extensive power over corporate charters and intrastate business privileges:

If the aggregation of enormous industries under a single control is an economic evil, as to which I express no opinion, the evil can be easily cured by the legislature. . . .

Both of the defendants are foreign corporations, but the control of the legislature over them is fully as plenary as in the case of domestic corporations. With the exception of a very limited class, such as corporations engaged in interstate transportation and the like, a foreign

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983. *Id.* at 451, 106 N.Y.S. at 121-22.

984. *Id.* at 451-52, 106 N.Y.S. at 121. Judge Gaynor concurred, reiterating the legitimacy of an individual refusal to deal and stressing the critical absence of any allegation of a combination. *Id.* at 455-56, 106 N.Y.S. at 124 (Gaynor, J., concurring).

985. *Locker v. American Tobacco Co.*, 195 N.Y. 565, 88 N.E. 289 (1909).

986. *See supra* text accompanying notes 730-31.

987. *Locker*, 195 N.Y. at 566, 88 N.E. at 289 (Cullen, C.J., concurring).



corporation cannot breathe or exist within the limits of a state except by the consent of the state. The state may refuse admittance to such a corporation for any reason, and unless the right has been contracted away, which is hardly possible under the Constitution of this state, it can equally unceremoniously turn it out. A statute prohibiting any foreign corporation doing business within a state from removing suits against it to the Federal courts is void . . . but though the statute cannot prevent the corporation from removing the suit, it may expel the corporation because it has removed the suit. . . . If the case before us does present the existence of any real economic evil, that evil may be easily dealt with by the legislature.<sup>988</sup>

Yet, as noted previously, while the New York judges contrasted individual and concerted refusals to deal in *Locker*, at other times they declared that similar principles governed both individual and concerted refusals,<sup>989</sup> and they sometimes approved concerted refusals to deal that had been used to support exclusive dealing demands.<sup>990</sup> For example, in 1907 and 1909 New York courts upheld concerted activity undertaken by combinations of theatre owners who established multicircuit theatre circuits and then demanded that owners of theatrical attractions play their attractions only in circuit theatres.<sup>991</sup> In both cases, the court stressed the presence of good motives and the substantial reduction of expense made possible by circuit booking, which allowed tours to be arranged in as continuous a line as possible and thereby cut transportation costs dramatically.<sup>992</sup>

Missouri judges exhibited similar, if not invariable, support for sole outlet and exclusive dealing agreements. For example, in 1903 the Missouri Supreme Court approved a patent licensing arrangement granting the licensee exclusive rights to use and sell a patented item in eight states and prohibiting the licensee from using or selling other similar items.<sup>993</sup> The court found the agreement not to be a restraint of trade, declaring that "[p]atented inventions and secrets of art or trade not patentable, are not within the purview of the rule against restraint of trade."<sup>994</sup> Five years later, the court addressed the legitimacy of exclusive dealing in the absence of such factors in its extensive opinion in *State ex rel. Hadley v. Standard Oil Co.* In that case, the state challenged a territorial division of Missouri between Standard Oil of Indiana and the

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988. *Id.* at 566–68, 88 N.E. at 289–90 (citations omitted) (Cullen, C.J., concurring). For an additional example of judicial tolerance for a "sole outlet" arrangement, see *Stemmerman v. Kelly*, 150 A.D. 735, 135 N.Y.S. 827 (1912) (upholding an asphalt manufacturer's agreement not to sell asphalt for street paving in New York City to anyone other than the defendant for a period of five years), *aff'd*, 220 N.Y. 756, 116 N.E. 1077 (1917). On state power over foreign and domestic corporations under contemporary constitutional theory, and its practical limitations, see May, *supra* note 4, at 502, 510–17. See also *supra* note 748.

989. See *supra* text accompanying note 862.

990. See, e.g., *Heim v. New York Stock Exch.*, 118 N.Y.S. 591 (Sup. Ct., Spec. Term 1909), discussed *supra* text accompanying notes 886–89.

991. See *Roseneau v. Empire Circuit Co.*, 131 A.D. 429, 115 N.Y.S. 511 (1909); *People v. Klaw*, 55 Misc. 72, 106 N.Y.S. 341 (Ct. Gen. Sess. 1907).

992. In *People v. Klaw*, 55 Misc. 72, 106 N.Y.S. 341 (Ct. Gen. Sess. 1907), the court also found that rival theatre owners continued to operate successfully despite the defendant's activity. In *Roseneau v. Empire Circuit Co.*, 131 A.D. 429, 115 N.Y.S. 511 (1909), the court found the defendant's activity lawful even though it led to the destruction of a rival theatre in Buffalo. One judge in that case, however, found the challenged arrangement to be motivated by malice and not necessary to achieve efficiency. Accordingly he declared the arrangement invalid, although he concurred in the court's judgment ordering a new trial, on the ground that the jury's damage award of \$66,750 was "grossly excessive." See *id.* at 436–43, 115 N.Y.S. at 517–22 (Spring, J., concurring).

993. See *Standard Fireproof Co. v. St. Louis Expanded Metal Fireproof Co.*, 177 Mo. 559, 76 S.W. 1008 (1903).

994. *Id.* at 576, 76 S.W. at 1012.

Waters-Pierce Oil Company. At the same time, state authorities also attacked a related practice by which Standard of Indiana sold its refined oil only to Waters-Pierce within Waters-Pierce territory, and by which Waters-Pierce bought oil only from Standard of Indiana.<sup>995</sup> The companies argued that Standard Oil of Indiana, as a refiner, had a right to sell exclusively to a single dealer (itself) in the northern half of Missouri and exclusively to another single dealer (Waters-Pierce) in the southern half of the state.<sup>996</sup>

To evaluate this defense, the court reviewed recent federal and state antitrust and restraint of trade opinions approving exclusive dealing.<sup>997</sup> It concluded that purely vertical sole outlet and exclusive dealing arrangements were perfectly lawful and posed no threat to competition. The court explained that such an agreement

in no manner prevents other manufacturers from selling the same class of goods to other dealers in the same towns in competition with those sold under the supposed contract. There is nothing wrong legally or morally in such a contract and arrangements. No manufacturer, in the absence of express legislation to the contrary, should be required to place his own fabrics in competition with each other. The law is satisfied in that regard if the different manufacturers of goods are left in reasonable and fair competition with each other.<sup>998</sup>

The court found, however, that the defendants had gone beyond such purely vertical arrangements because Standard Oil of Indiana was not only a refiner but also a dealer in oil like Waters-Pierce. The agreement, therefore, involved a horizontal territorial division among dealers and violated state antitrust law.<sup>999</sup>

The Missouri Supreme Court's final major analysis of vertical restraint issues involved one of the numerous contemporary contracts by which a local telephone company agreed to allow a single long-distance telephone system exclusive physical interconnection with the local network, and further agreed to deliver to that long-distance system all telephone traffic destined for the points it served, whether or not those points were served by other systems as well. In *Home Telephone Co. v. Sarcoxie Light & Telephone Co.*,<sup>1000</sup> the local company allegedly had breached such an agreement by granting the rival Bell Telephone Company a physical connection to the local network and by transmitting to Bell messages that were destined for points the plaintiff served. The court found that these allegations stated a good claim and if proved would entitle the plaintiff to injunctive relief. Holding directly contrary to a St. Louis Court of Appeals decision that had addressed a parallel situation just a year

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995. *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 38-40, 116 S.W. 902, 908 (1909), *aff'd sub nom. Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912).

996. *Id.* at 404-05, 116 S.W. at 1027.

997. *Id.* at 405-16, 116 S.W. at 1027-31. The court particularly relied on the case of *Whitwell v. Continental Tobacco Co.*, 125 F. 454 (8th Cir. 1903). That case had declared, in part, that such activity was merely the exercise of "unquestioned rights which are indispensable to the existence of competition or to the conduct of trade." *Standard Oil*, 218 Mo. at 409, 116 S.W. at 1029.

998. *Standard Oil*, 218 Mo. at 416-17, 116 S.W. at 1031.

999. *Id.* at 417-18, 116 S.W. at 1032. In modern antitrust terminology, the condemned agreement thus involved "dual distribution." In recent years, federal courts have differed significantly in their antitrust analyses of arrangements involving "dual distribution," sometimes treating them as essentially vertical activity, sometimes as horizontal. *See, e.g.,* H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* § 9.4, at 271 (1985). As previously noted, *supra* note 735, in the Missouri case, the defendants did not argue that any different analysis might apply because the companies were affiliated, nor did the Missouri Supreme Court address that issue in invalidating the arrangement.

1000. 236 Mo. 114, 139 S.W. 108 (1911).

previously,<sup>1001</sup> the Missouri Supreme Court rejected charges that the contract in question violated antitrust standards or was otherwise contrary to public policy. In the court's view, the contract, when made, was procompetitive. By linking the plaintiff's and defendant's complementary lines, it established a competitive alternative to Bell's existing, monopoly long-distance lines.<sup>1002</sup> While all telephone companies had a legal obligation to receive and transmit all messages coming to them, the defendant had no obligation to provide all interested individuals and companies with a *physical* connection between its own lines and theirs.<sup>1003</sup> Indeed, "such a contention, if sustained, would absolutely deprive a corporation of all property rights in its own business."<sup>1004</sup> Accordingly, the contract provisions granting the plaintiff exclusive connection and traffic rights were perfectly lawful and were enforceable against Bell's attempt to link itself to the local network.<sup>1005</sup>

## 2. *The Status and Contexts of Resale Price Maintenance*

State and federal courts repeatedly grappled not only with exclusive dealing concerns but also with resale price maintenance issues throughout the Progressive Era. Congress did not pass new legislation specifically directed to resale price maintenance, and only a few states enacted such measures.<sup>1006</sup> Yet, the practice nevertheless became the target of frequent challenge under more general antitrust provisions, particularly as firms in certain lines of trade increasingly promoted resale price maintenance to counter intensified price competition from large discount dealers.<sup>1007</sup> Prior to 1911, state and federal courts frequently declared particular examples of resale price maintenance to be lawful, often on the ground that these arrangements were within the scope of relevant intellectual property, or analogous, protections.<sup>1008</sup> In 1911, however, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,<sup>1009</sup> the United States Supreme Court condemned a system of resale price maintenance established by a manufacturer of unpatented proprietary medicines, finding the system's impact to be analogous to that of a price-fixing cartel among dealers.<sup>1010</sup>

1001. See *Home Tel. Co. v. Granby & Neosho Tel. Co.*, 147 Mo. App. 216, 247-48, 126 S.W. 773, 782-83 (1910).

1002. *Sarcoie*, 236 Mo. at 128, 139 S.W. at 111. Apparently, at the time of the contract, Bell had its own separate phone booths for long distance calling rather than offering long distance service through interconnection with local service lines. *Id.*

1003. *Id.* at 133, 139 S.W. at 113.

1004. *Id.* at 137, 139 S.W. at 114.

1005. *Id.* at 138, 139 S.W. at 114. For examples of additional Missouri exclusive dealing cases, see *First Nat'l Bank v. Missouri Glass Co.*, 169 Mo. App. 374, 401, 152 S.W. 378, 386 (1912) (approving a collective exclusive dealing requirement under the federal Sherman Act); *Pope-Turnbo v. Bedford*, 147 Mo. App. 692, 697, 127 S.W. 426, 428 (1910) (declaring invalid an agreement to use plaintiff's hair remedy exclusively).

1006. See J. DAVIES, *supra* note 252, at 183.

1007. See, e.g., T. McCRAW, *supra* note 5, at 101-08 (describing the efforts of Louis Brandeis in support of resale price maintenance).

1008. See, for example, the review of these cases set forth in *John D. Park & Sons Co. v. Hartman*, 153 F. 24 (6th Cir. 1907), *cert. dismissed*, 212 U.S. 588 (1908).

1009. 220 U.S. 373 (1911).

1010. The Court also rejected claims that: 1) only an agency arrangement was involved, rather than a system of sales with resale restrictions, *id.* at 395-99, 2) resale price maintenance was valid when such restrictions related to proprietary

Although Missouri courts did not have occasion to address resale price maintenance during the Progressive Era, New York judges rendered an important series of opinions on resale price maintenance that were given prominent consideration in the leading United States Circuit Court of Appeals decision that preceded and substantially influenced the *Dr. Miles* opinion itself.<sup>1011</sup> In these New York cases, state judges confronted recurring issues of purely vertical versus horizontal combination, competitive impact, the scope of pertinent property and contract rights, and the relevance of copyright, patent, and trademark concerns. The cases exhibited a mixed reaction to resale price maintenance. Even supportive opinions, however, were premised on grounds different from the output enhancement and services-promotion rationales often stressed in recent scholarly justifications of such arrangements.<sup>1012</sup>

New York judges approved resale price maintenance in two cases decided by the appellate division of the supreme court in 1899. In *Murphy v. Christian Press Association Publishing Co.*,<sup>1013</sup> the court held that a copyright owner had the right to establish minimum retail prices to be charged by a company publishing the copyrighted work. Such an arrangement, it declared, could not be void as a restraint of trade because "[t]he principle that contracts in restraint of trade are against public policy, and, therefore, illegal, has no application to the publication of a copyrighted book or a patented invention."<sup>1014</sup>

A few months later, the appellate division upheld resale price maintenance outside an intellectual property setting. In *Walsh v. Dwight*,<sup>1015</sup> a manufacturer of saleratus and soda allegedly offered a rebate to those dealers who agreed not to sell either the manufacturer's product or any other brands of saleratus and soda at less than certain stipulated prices. The court rejected a challenge to this practice brought by a rival manufacturer of a lower priced brand who claimed to have suffered \$50,000 in damages because of the practice.<sup>1016</sup> In the court's view, the defendants clearly could have employed agents to sell their goods at whatever prices the defendants set.<sup>1017</sup> The adoption of exclusive dealing and resale price maintenance, when distribution was accomplished through independent dealers, similarly was legitimate in the court's estimation, for neither practice could be deemed anticompetitive or monopolistic:

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medicines manufactured under a secret process even if the product was neither patented nor copyrighted, *id.* at 401-04, and 3) the power to set resale restrictions was implicit in the property rights and liberty of the manufacturer, *id.* at 404-05.

1011. See *John D. Park & Sons Co. v. Hartman*, 153 F. 24, 35-38 (6th Cir. 1907) (discussing the New York cases), *cert. dismissed*, 212 U.S. 588 (1908). In *Dr. Miles*, the Supreme Court expressly noted Judge Lurton's careful review of resale price maintenance issues in *Hartman* and the lower court's justified reliance upon it in *Dr. Miles*. *Dr. Miles*, 220 U.S. at 399-400, 409. Judge Lurton himself had written the Sixth Circuit Court of Appeals' opinion in *Dr. Miles* as well as in *Hartman*, see *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 164 F. 803, 804 (6th Cir. 1908), *aff'd*, 220 U.S. 373 (1911), and had joined the Supreme Court by the time the high court rendered its own opinion in 1911. Having decided the case below, he took no part in Supreme Court consideration or voting. *Dr. Miles*, 220 U.S. at 409.

1012. See, e.g., R. BORK, *supra* note 6, at 288-91; H. HOVENKAMP, *supra* note 999, at § 9.2.

1013. 38 A.D. 426, 56 N.Y.S. 597 (1899).

1014. *Id.* at 430, 56 N.Y.S. at 599.

1015. 40 A.D. 513, 58 N.Y.S. 91 (1899).

1016. *Id.* at 515, 58 N.Y.S. at 92.

1017. *Id.* at 516, 58 N.Y.S. at 93.

If a dealer in articles of this kind, for his own advantage, agrees to confine his business to a particular line of goods, or agrees with the manufacturers to charge a particular price for the articles which he sells in his business, such an agreement is not illegal as in restraint of trade or as tending to create a monopoly, as there is nothing in the agreement to prevent others from engaging in the business, or the manufacturer [sic] of other articles from selling their products to any one who is willing to buy.<sup>1018</sup>

Accordingly, resale price maintenance by a single manufacturer did not violate state antitrust law.<sup>1019</sup> Without noting the fact that the defendants' alleged activity went beyond purely intrabrand restrictions and directly targeted *interbrand* price competition, the court stressed that the state antitrust statute was directed not at vertical arrangements by single firms, but instead at anticompetitive behavior by groups of manufacturers or combinations of dealers.<sup>1020</sup>

Soon thereafter, however, both the appellate division and the court of appeals upheld resale price maintenance in a case where horizontal combination was present; indeed, in a case involving the same contract system later condemned by the United States Supreme Court in *Dr. Miles*. In *John D. Park & Sons Co. v. National Wholesale Druggists' Association*,<sup>1021</sup> the court of appeals affirmed by a four to three vote an appellate division decision<sup>1022</sup> dismissing a challenge to concerted activities of the National Wholesale Druggists' Association. The activities in question allegedly had prompted large numbers of manufacturers and proprietors of "patent" or "proprietary" medicines to agree to adopt resale price maintenance and to charge uniform prices to all wholesale dealers. When the plaintiff dealer refused to abide by such resale price maintenance restrictions, the manufacturers refused to sell medicines to it and the plaintiff sought injunctive relief.<sup>1023</sup>

Judge Albert Haight, for the court, emphasized the importance of the issue posed by the case, noting that resale price maintenance had been adopted in many lines of commerce where manufacturers were concerned about maintaining the reputation of trademarked goods.<sup>1024</sup> He concluded that the defendant wholesalers had a right collectively to encourage the manufacturers to adopt practices in the wholesalers' interests.<sup>1025</sup> The manufacturers had not been compelled,<sup>1026</sup> and individual manufacturers, having the exclusive right to manufacture their own goods, had a right to adopt the suggested practices if they became convinced that they were "more advantageous to them and more fair and just to the public."<sup>1027</sup> Each manufacturer

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1018. *Id.*

1019. In addition, the court stressed that the plaintiff had not alleged that the defendants had entered into any agreements with the plaintiff's customers or with anyone other than the defendants' regular customers. *Id.* at 515, 58 N.Y.S. at 92. The court also emphasized that the affected dealers were not prevented from dealing in rival commodities but merely were given an incentive to equalize the sale price of the various brands. *Id.* at 516, 58 N.Y.S. at 92.

1020. *Id.* at 517, 58 N.Y.S. at 93-94.

1021. 175 N.Y. 1, 67 N.E. 136 (1903).

1022. *John D. Park & Sons Co. v. National Wholesale Drug. Ass'n*, 54 A.D. 223, 66 N.Y.S. 615 (1900), *aff'd*, 175 N.Y. 1, 67 N.E. 136 (1903).

1023. *John D. Park*, 175 N.Y. at 5-7, 67 N.E. at 137-38.

1024. *Id.* at 7-8, 67 N.E. at 138.

1025. *Id.* at 8, 67 N.E. at 138.

1026. *Id.* at 10, 67 N.E. at 139.

1027. *Id.* at 9, 67 N.E. at 138.

continued to set its own separate sale and resale prices,<sup>1028</sup> and the plaintiff had not accused the manufacturers of any direct, horizontal price fixing among themselves. Judge Haight concluded that the new industry distribution plan could not be deemed to be in restraint of trade.<sup>1029</sup> He explained:

It is true that it does away with the competition among dealers as to prices, but it creates no restriction upon them as to the quantities that they may be able to sell or the territory within which they may confine their transactions; but upon the question of prices we must bear in mind that the goods are covered by patent rights and trade marks, which give the proprietors the exclusive right of specifying prices at which the articles shall be sold, and following this, the right also to require dealers to maintain the prices specified. The plan does not operate to restrict sales in any localities, but contemplates a ready method of distributing the goods throughout the entire country. It is, in effect, the creating of an agency on the part of the proprietors, by which every druggist throughout the United States may receive the goods and dispose of them as agents of the principal, receiving the commissions agreed upon therefor.<sup>1030</sup>

Finally, the plaintiff could not complain of any "boycott" by manufacturers, because it could, "at any time, avail itself of the right to purchase upon the contract plan by complying with the requirements of the proprietors."<sup>1031</sup>

Judge Celora Martin, writing for the three dissenters, disagreed strongly with both the factual and legal analyses set forth in Judge Haight's majority opinion. In Judge Martin's view, the manufacturers had been compelled to adopt the new practices "to protect themselves with the wholesale dealers,"<sup>1032</sup> and the plaintiff's pleading sufficiently alleged that the plaintiff had been the victim of an unlawful boycott by manufacturers and dealers.<sup>1033</sup> Whereas Chief Judge Parker, in concurrence, found the challenged activities to be analogous to the behavior approved in *National Protective Association of Steam Fitters and Helpers v. Cumming*,<sup>1034</sup> Judge

1028. *Id.* at 15, 67 N.E. at 141 (Parker, C.J., concurring).

1029. *Id.* at 9, 67 N.E. at 138.

1030. *Id.* at 9, 67 N.E. at 138-39. Judge Haight also strongly endorsed the wholesalers' right to persuade manufacturers to charge uniform prices to distributors. *Id.* at 14, 67 N.E. at 140. The plaintiff had claimed that the challenged practices had been advocated because the defendant wholesaler and jobbing druggists "were unable to handle the goods as cheaply" as the few large companies like the plaintiff itself, which previously had purchased large quantities at reduced rates. *Id.* at 13, 67 N.E. at 140 (emphasis deleted). Judge Haight did not clearly indicate whether the plaintiff's prior purchasing advantage had resulted from cost savings to the manufacturer in handling large orders or simply from the plaintiff's market power. Yet he strongly implied that the latter was the case, *see id.*, and declared that elimination of the previously existing pattern of competition was not against public policy:

An active competition and rivalry in business is, undoubtedly, conducive to the public welfare, but we must not shut our eyes to the fact that competition may be carried to such an extent as to accomplish the financial ruin of those engaged therein and thus result in a derangement of the business, an inconvenience to consumers, and in public harm. While public policy demands a healthy competition it abhors favoritism, secret rebates and unfair dealing and commends the conduct of business in such a way as to serve all consumers alike.

*Id.* at 9, 67 N.E. at 139.

1031. *Id.* at 11, 67 N.E. at 139. Chief Judge Parker concurred, finding no purpose to raise consumer prices or manufacturer or dealer profits and reaffirmed that "the proprietor of patent medicines has the right to fix the price at which his article shall go to the consumer." *Id.* at 17, 67 N.E. at 141 (Parker, C.J., concurring). In Chief Judge Parker's view, the whole matter was simply "a controversy between opponents in business, neither side trying to help the public. Nor will the public be the gainer by the success of either." *Id.* at 21, 67 N.E. at 143 (Parker, C.J., concurring).

1032. *Id.* at 25, 67 N.E. at 144 (Martin, J., dissenting).

1033. *Id.* at 44, 67 N.E. at 145-47 (Martin, J., dissenting).

1034. *Id.* at 18, 67 N.E. at 143 (Parker, C.J., concurring). For a discussion of that case, see *supra* text accompanying notes 861-79.

Martin invoked the earlier labor case of *Curran v. Galen* as the appropriate parallel<sup>1035</sup> and condemned the court's disparate treatment of labor and business. Such treatment, he declared,

would result in a discrimination in favor of capital or business which could not be sustained upon any just or legal principle known to or established by statute or common law. With the existing conflict between capital and labor, such a distinction would not only be unjust, but extremely unfortunate, especially as it can be justified upon no principle of ethics, law or equity.<sup>1036</sup>

In Judge Martin's view, the majority's decision approved a combination with an obviously anticompetitive purpose, and thus undermined the fundamental policy of competition.<sup>1037</sup> That policy, he emphasized, ultimately was not necessarily harmful even to the smaller dealers who might feel threatened by it. He noted:

While this principle has not been thus firmly and universally settled without discussion as to whether it does not work a greater hardship than advantage by crushing out weaker competitors and causing disaster to others by reduction of prices, yet, notwithstanding these arguments, the consideration which the question has received has led to the conclusion that public policy requires the continuance and enforcement of the rule of competition as a principle controlling business affairs in the various commonwealths. This principle of political economy is not based alone upon the theory that combinations to prevent competition will, of necessity, enhance the price, as there are notable instances where such combinations have, even permanently, reduced the price of articles thus traded in or manufactured, but it is founded upon the theory that such combinations may, as they usually will, enhance the price and also drive small and worthy dealers out of business.<sup>1038</sup>

Where the complaint charged that manufacturers had been compelled against their will to refuse to sell to the plaintiff unless it adhered to resale price maintenance, it was irrelevant "that the medicines may have been patented or copyrighted."<sup>1039</sup>

Subsequently, the court of appeals had occasion to address resale price maintenance in a second context of horizontal combination, and to clarify the meaning of its *John D. Park & Sons* holding, in its 1904<sup>1040</sup> and 1908<sup>1041</sup> decisions in *Straus v. American Publishers' Association*. In the 1904 case, the owners of Macy's department store challenged concerted activity by the members of the American Publishers' Association, who reportedly constituted ninety-five percent of the publishers in the book trade and did ninety percent of the business in that

1035. *Id.* at 40-41, 67 N.E. at 150 (Martin, J., dissenting). For a discussion of *Curran v. Galen*, see *supra* text accompanying notes 855-60.

1036. *John D. Park*, 175 N.Y. at 41, 67 N.E. at 150-51 (Martin, J., dissenting).

1037. *Id.* at 34, 67 N.E. at 148 (Martin, J., dissenting).

1038. *Id.*

1039. *Id.* at 42, 67 N.E. at 151 (Martin, J., dissenting). Compelling the manufacturers to adopt a uniform price for sales to merchants, "without regard to the expense of delivery or the amount of the sale," also was troublesome to Judge Martin, who believed it was merely an undue interference with the manufacturers' business freedom. *Id.* at 32-33, 67 N.E. at 147-48 (Martin, J., dissenting). Judge Cullen also dissented. He believed that compelling adoption of uniform prices to merchants was lawful, but that pressuring manufacturers to adopt resale price maintenance was not. "It is in this respect," he declared, "that the agreement is vicious and operates in restraint of trade, for it destroys competition among the jobbers." *Id.* at 45, 67 N.E. at 152 (Cullen, J., dissenting).

1040. *Straus v. American Pub. Ass'n*, 177 N.Y. 473, 69 N.E. 1107 (1904).

1041. *Straus v. American Pub. Ass'n*, 193 N.Y. 496, 86 N.E. 525 (1908).

trade.<sup>1042</sup> The publishers collectively refused to sell either copyrighted or uncopyrighted books to any dealers who did not comply with the resale price maintenance restrictions separately established by each of the various publishers.<sup>1043</sup> The court of appeals, per Chief Judge Parker, condemned this arrangement as a violation of state antitrust law, explaining *John D. Park & Sons* as a holding premised on the presence of intellectual property rights. The arrangement in *Straus* was unlawful, Chief Judge Parker declared, because it went beyond the scope of such rights and adversely affected the plaintiffs' right to sell uncopyrighted books at the price they chose.<sup>1044</sup>

Two judges vigorously dissented. Judge Gray found the impact on sales of uncopyrighted works to be merely an incidental effect of legitimate efforts within the scope of copyright rights.<sup>1045</sup> Judge Bartlett agreed, stressing the economic and social dangers of the loss-leader practices of department stores and the legitimacy of private efforts to combat such practices. He declared that the case

discloses one of the saddest phases of our modern business life.

It is a well-known fact that the great department stores of the country have encroached upon many lines of trade entirely distinct from the main and legitimate business in which they are engaged. As an illustration, a dry goods establishment . . . concludes, in order to promote its principal trade, to offer for sale books, furniture, druggists' sundries and numerous other articles . . . at cut prices, representing only the cost of production, and oftentimes far below it. The inevitable effect of this policy is to draw a large number of people to these establishments, and in the final result the dealer makes good his losses in the outside trade by the prices he obtains in his legitimate business.

. . . .

The result is [that] a large number of retail dealers in the various kinds of articles thus undersold are driven out of business, many of them at a time of life when they are unable to reinstate themselves in some other calling.

It also results in great damage to manufacturers, producers and wholesale dealers in loss of customers who have been driven into insolvency.

It is, of course, true that the proprietors of department stores have the legal right to offer to the public goods of any kind at prices below production, or, indeed, may donate them to their customers. It is, however, equally true that the manufacturers, producers and wholesale dealers may say to the men whose policy is thus carrying ruin and destruction to their business and that of their customers, that if you persist in this disastrous cutting of rates we will sever all business relations absolutely. These are mutual and inherent rights, in the nature of things, so long as self-defense and the privilege to exist survive among men.<sup>1046</sup>

Subsequently, the defendants altered their agreement, making it applicable exclusively to copyrighted books. A bare majority of the court of appeals thereupon found this modified arrangement lawful in December of 1908.<sup>1047</sup> Five years later, however, the United States Supreme Court reversed and remanded the case, declaring

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1042. *Straus*, 177 N.Y. at 480, 69 N.E. at 1109.

1043. *Id.* at 477-78, 69 N.E. at 1108.

1044. *Id.* at 477, 69 N.E. at 1108.

1045. *Id.* at 488-91, 69 N.E. at 1112-13 (Gray, J., dissenting).

1046. *Id.* at 492-93, 69 N.E. at 1114 (Bartlett, J., dissenting).

1047. See *Straus v. American Pub. Ass'n*, 193 N.Y. 496, 498, 86 N.E. 525, 526 (1908). In so doing, the court distinguished the very recent United States Supreme Court decision in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1903). In that case, the Supreme Court declared that a copyright holder's efforts to maintain the sales prices of a copyrighted book by means of a printed notice on the copyright page went beyond the rights conferred by federal copyright law. *Id.* at 350.



that the New York court had “erred in holding that the agreement was justified by the copyright act.”<sup>1048</sup>

As previously noted, the United States Supreme Court, in its 1911 *Dr. Miles* opinion, ruled in favor of the price-cutting John D. Park & Sons Company and invalidated the contract system that the New York high court had approved in 1903.<sup>1049</sup> In part, the Supreme Court did so because it rejected claims to intellectual property protection that the New York judges had accepted.<sup>1050</sup> In addition, the Supreme Court expressed greater concern for the anticompetitive potential of resale price maintenance even when adopted by a single manufacturer than was expressed in early New York precedent.<sup>1051</sup> The contrast easily can be overstated, however, for the Supreme Court’s opinion in *Dr. Miles* constituted a less sweeping condemnation of resale price maintenance than is usually supposed.

In modern antitrust writing, *Dr. Miles* is commonly cited as an opinion declaring resale price maintenance unlawful per se.<sup>1052</sup> It is true that the Supreme Court dismissed the plaintiff’s asserted justifications for using resale price maintenance and that the Court saw the situation in *Dr. Miles* as economically analogous to a harmful dealers’ cartel.<sup>1053</sup> Nevertheless, the Court’s opinion did not explicitly declare that resale price maintenance always was unlawful regardless of purpose or context. And it is important to remember that Justice Hughes’ opinion for the Court was in very substantial part an explicit adoption and restatement<sup>1054</sup> of Judge Lurton’s lower court analyses in *John D. Park & Sons Co. v. Hartman*<sup>1055</sup> and in *Dr. Miles*<sup>1056</sup> itself, analyses that stopped substantially short of declaring resale price maintenance illegal per se.

As a judge on the United States Court of Appeals for the Sixth Circuit, Judge Horace Lurton had concurred in Judge Taft’s opinion in the *Addyston Pipe* case.<sup>1057</sup> Nearly ten years later, Judge Lurton still adhered to this basic approach to antitrust analysis, and, accordingly, he sought to evaluate the contract arrangements at issue in *Hartman* and *Dr. Miles* within Judge Taft’s reasonably ancillary/nonancillary framework. Judge Lurton did not declare that resale price maintenance was invariably pernicious. Rather, he explained his condemnation of the practices in these two cases in terms of the share of the market affected and the insufficiency of the particular justifications proffered by the parties to the litigation. For example, Judge Lurton stressed that

1048. *Straus v. American Pub. Ass’n*, 231 U.S. 222, 236 (1913).

1049. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 409 (1911).

1050. *Id.* at 400–04.

1051. *Id.* at 407–08.

1052. See, e.g., R. BORK, *supra* note 6, at 33 (“A rule of per se illegality was thus created . . .”); H. HOVENKAMP, *supra* note 999, § 9.3, at 258.

1053. *Dr. Miles*, 220 U.S. at 407–08.

1054. *Id.* at 409.

1055. 153 F. 24 (6th Cir. 1907).

1056. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 164 F. 804 (6th Cir. 1908), *aff’d*, 220 U.S. 373 (1911).

1057. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified and aff’d*, 175 U.S. 211 (1899).

we are to consider that we are not here dealing with a single contract. The complainant has made a multitude of them in identical terms, and the opposite parties comprehended, according to his bill, a large majority of the wholesale and retail druggists in the United States. The reasons which might uphold covenants restricting the liberty of a single buyer might prove quite inadequate when there are a multitude of identical agreements. The single covenant might in no way affect the public interest, when a large number might. So, also, the question as to whether the restraint was necessary to the retained business, and therefore ancillary to the principal purpose of the agreement, or whether the restraining covenants were not the principal rather than the ancillary matter, would largely depend upon the general sweep and result of a multiplication of identical contracts. . . . The question here is therefore one of a totally different character from that which would arise if the question was the more simple one presented by a breach by a single covenantee.<sup>1058</sup>

Judge Lurton concluded that the widespread price maintenance systems in *Hartman* and *Dr. Miles* effectually eliminated all wholesale and retail price competition in the particular manufacturer's product.<sup>1059</sup> But in *Hartman* he made it clear that the individual manufacturer's market share nevertheless was important in evaluating the legality of such a result:

It is true that the complainant is not in a combination with other makers of "Peruna." There are no others. If there were, there would not be a complete or general restraint; for it might then happen that these others, not being bound by any covenants, could supply the public. If the supply to come from them was adequate for the public demand, the public might be in no wise affected.<sup>1060</sup>

Judge Lurton did not assert that no justification ever could support a resale price maintenance system. Rather, he stressed the inadequacy of the pleadings in the cases before him. He explained:

Prima facie the contracts are plainly in restraint of trade. It was for the complainant to show that the covenants were not larger than necessary for his protection against an unjust use to the injury of complainant's retained business. . . . This the bill does not do, unless the court is to be content with general averments that the competition methods called derisively the "cut rate" or "cut price" system had "demoralized," "confused," "troubled," and "damaged" the complainant's business. . . . [S]uch an averment as this can be of no legal consequence, for it is no more than to say that a noncompetitive system of conducting trade and traffic in the line of articles made by complainant is of more advantage than the ordinary competitive system. . . . The whole economic system which has made our civilization is founded upon the theory that competition is desirable, and the common-law rules against restraints of trade rest upon that foundation. . . . How the suppression of competition between his vendees and subvendees is to secure to him the enjoyment of the legitimate fruits of his contracts of sale, to which the restrictive covenants are supposed to be ancillary, or to protect him against an unjust competition, is not clear, and the bill states no facts from which we can determine whether these covenants are necessary and reasonable.<sup>1061</sup>

1058. *Hartman*, 153 F. at 41. Elsewhere in the same opinion, Judge Lurton similarly noted: "A general system of contracts . . . involves very different questions from those which arise when a single contract only is involved and when the action is between the contracting parties for a breach . . ." *Id.* at 43.

1059. *Id.* at 42; *Dr. Miles*, 164 F. at 806-07.

1060. *Hartman*, 153 F. at 42.

1061. *Id.* at 44. See also *Dr. Miles*, 164 F. at 807 ("All that we said in respect to the Hartman system is applicable here.").

Justice Charles Evans Hughes' opinion for the United States Supreme Court in *Dr. Miles* appears to have consciously followed the lines of Judge Lurton's analysis, even if it was much less explicit with regard to the relevance of market share and the extent of future judicial willingness to consider possible justifications for resale price maintenance. Justice Hughes, indeed, concluded his opinion by praising Judge Lurton's careful analysis in *Hartman*.<sup>1062</sup> Justice Hughes stressed that *Dr. Miles* involved a widespread system eliminating all wholesale and retail price competition in the affected products and cited Judge Lurton's description of such a system at this point.<sup>1063</sup> He emphasized that the Court was not "dealing with a single transaction, conceivably unrelated to the public interest."<sup>1064</sup> Justice Hughes, like Judge Lurton, dismissed the plaintiff's general claims "that confusion and damage have resulted from sales at less than the prices fixed."<sup>1065</sup> In so doing, however, he did not necessarily declare that no justification for resale price maintenance could ever be found in other contexts. Instead, Justice Hughes, like Judge Lurton, believed that the plaintiffs were really just objecting to the normal process of competition itself, and believed that such an objection could fare no better when raised by the plaintiff than it would if raised by members of a dealers' cartel.<sup>1066</sup>

## IX. CONCLUSION

Once in America there was a powerful, widely shared vision of a natural, rights-based political and economic order that simultaneously tended to ensure opportunity, efficiency, prosperity, justice, harmony, and freedom; and laissez-faire constitutionalism and antitrust law were deemed to be crucial, complementary vehicles for its realization. This general, traditional vision never held universal sway among all observers,<sup>1067</sup> nor did traditionally-minded Americans ever fully agree on the correct application of shared traditional principles.<sup>1068</sup> Moreover, diversity of perspective and application markedly increased in the late nineteenth and early twentieth centuries as the growing importance of economies of scale and consequent problems of "overproduction"<sup>1069</sup> sparked accelerated cartelization and concentration,<sup>1070</sup> along with expanded state and federal regulation.<sup>1071</sup>

In the midst of these developments, the familiar, general perspectives of political liberalism and classical economics continued to provide a powerful frame of reference for a great many Americans seeking to comprehend and respond to the

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1062. See *Dr. Miles*, 220 U.S. at 409.

1063. *Id.* at 399-400.

1064. *Id.* at 407.

1065. *Id.*

1066. *Id.* at 407-08. In this connection, Justice Hughes explained: "The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." *Id.* at 409.

1067. See *supra* text accompanying notes 199-200, 206.

1068. See *supra* text accompanying notes 201-05.

1069. See *supra* text accompanying notes 220-23.

1070. See *supra* text accompanying notes 224-30.

1071. See *supra* note 209 and accompanying text.

ongoing processes of national economic change.<sup>1072</sup> Contemporary legal reasoning strikingly reflected the continuing power of traditional perspectives, and Progressive Era legislators and judges repeatedly reaffirmed the basic, traditional rights of labor, property, and exchange,<sup>1073</sup> and the fundamental, related principles of competition<sup>1074</sup> and “nondiscretionary” adjudication,<sup>1075</sup> in both constitutional<sup>1076</sup> and antitrust<sup>1077</sup> analysis throughout the formative era.

Over time, the power of this traditional vision declined as Americans came to terms with the newly arisen patterns of concentrated corporate capitalism and expanded government regulation,<sup>1078</sup> and as twentieth century intellectual thought in general increasingly turned away from the grand, natural law perspectives of the prior century.<sup>1079</sup> By the close of the Progressive Era, antitrust law no longer lay at the center of American political debate and public concern in the way it had during the presidential election of 1912<sup>1080</sup> and the Federal Trade Commission Act and Clayton Act debates of 1914.<sup>1081</sup> As Richard Hofstadter noted, as Americans widely came to accept the new, more concentrated patterns of economic life and increasingly came to appreciate the benefits believed to result from these patterns, the antitrust “movement” died, and antitrust theory in subsequent decades primarily became the domain of a more specialized group of lawyers, scholars, and enforcement officials.<sup>1082</sup>

Over the decades, antitrust analysis increasingly diverged from the premises and methods of constitutional theory even as judges, scholars, and legislators continued to assert parallels between the two fields. In his 1933 opinion for the Court in *Appalachian Coals, Inc. v. United States*,<sup>1083</sup> for example, Chief Justice Hughes, the author of the Court’s 1911 opinion in *Dr. Miles*,<sup>1084</sup> prominently described the Sherman Act as “a charter of freedom” possessing a “generality and adaptability comparable to that found to be desirable in constitutional provisions.”<sup>1085</sup> During the same decade, however, the Supreme Court dramatically altered its approach to constitutional adjudication in a way that severely eroded the original symmetry of constitutional and antitrust analysis. Beginning in 1937, the Court abruptly reversed the strongly conservative trend that had prevailed in Supreme Court jurisprudence

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1072. See *supra* note 198 and accompanying text.

1073. See *supra* text accompanying notes 86–129.

1074. See *supra* text accompanying notes 101–08.

1075. See *supra* text accompanying notes 57–66.

1076. See *supra* text accompanying notes 20–78, 154–97.

1077. See *supra* text accompanying notes 267–430, 609–1066.

1078. See, e.g., M. SKLAR, *supra* note 1, at 33–40, 431–41.

1079. See generally E. PURCELL, *supra* note 66.

1080. See *supra* text accompanying note 236.

1081. See, e.g., M. SKLAR, *supra* note 1, at 324–32.

1082. See R. HOFSTADTER, *Antitrust Movement*, *supra* note 85, at 189, 193–95.

1083. 288 U.S. 344 (1933).

1084. See *supra* text accompanying notes 1009–10, 1062–66.

1085. *Appalachian Coals*, 288 U.S. at 359–60. Some modern commentators severely criticize Chief Justice Hughes for this emphasis on the generality and flexibility of the Sherman Act, believing that his opinion led to substantially greater judicial discretion than had been the accepted norm during the formative era itself. See, e.g., Arthur, *Farewell*, *supra* note 12, at 306–08.

since the close of the First World War,<sup>1086</sup> and drastically reduced the power of the longstanding principles of laissez-faire constitutionalism,<sup>1087</sup> as it moved to support the expanded governmental activity of the New Deal era.<sup>1088</sup> After 1937 the Court almost never sustained due process or equal protection challenges to business regulation.<sup>1089</sup> Beginning in the early 1930s, the focus of constitutional debate and analysis changed as the Court increasingly emphasized not the precepts of laissez-faire constitutional doctrine, but instead the civil liberties and civil rights of minorities seeking greater freedom of political expression and more adequate protection against various forms of public discrimination.<sup>1090</sup>

Accordingly, when the Court in its 1958 opinion in *Northern Pacific Railway v. United States*<sup>1091</sup> described the fundamental nature and purpose of the Sherman Act in a manner that echoed the traditional economic perspectives of the formative era,<sup>1092</sup> it did so at a time when constitutional analysis largely had shifted to a different, "noneconomic" set of priorities. This divergence between constitutional and antitrust law repeatedly became evident during the 1960s. Although the Supreme Court expressed heightened concern for individual rights in both constitutional and antitrust adjudication in these years,<sup>1093</sup> it no longer stressed precisely the same rights in these two types of litigation.<sup>1094</sup>

The Supreme Court explicitly highlighted this difference in the 1972 case of *United States v. Topco Associates, Inc.*<sup>1095</sup> In that case, while the Court again emphasized a parallel between constitutional and antitrust adjudication, it expressly declared that the two fields protected different sets of basic rights. In a frequently quoted passage, the Court explained:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the

1086. See, e.g., A. KELLY, W. HARBISON & H. BELZ, *supra* note 20, at 459-65, 487-94; J. SEMONCHE, *supra* note 23, at 423-26.

1087. See A. KELLY, W. HARBISON & H. BELZ, *supra* note 20, at 509-10; J. SEMONCHE, *supra* note 23, at 426.

1088. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

1089. See, e.g., A. KELLY, W. HARBISON & H. BELZ, *supra* note 20, at 509-10.

1090. See, e.g., *id.* at 534-49, 602-62. Although the Court has expanded such protection in general over the last fifty years, it has nevertheless seriously limited minority rights in particular cases during this period. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

1091. 356 U.S. 1 (1958).

1092. The Court strongly affirmed that the Sherman Act sought to promote simultaneously a number of basic economic and political goals of the sort frequently reiterated during the formative era, declaring:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

*Id.* at 4.

1093. See, e.g., Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325, 334 (1968).

1094. See, e.g., A. KELLY, W. HARBISON & H. BELZ, *supra* note 20, at 614-16, 620-34; Kauper, *supra* note 1093, at 333-34.

1095. 405 U.S. 596 (1972).

freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.<sup>1096</sup>

By the 1960s the political and economic vision that once had been central to both constitutional and antitrust analysis no longer established the general frame of reference for legal and economic theory,<sup>1097</sup> and the Supreme Court's reinvigorated affirmation of economic rights in the antitrust field generated substantial opposition. In the 1970s and 1980s antitrust scholars and practitioners, operating within a very different theoretical context than that of formative era analysts, frequently have criticized such a "constitutional" or "rights" focused orientation as largely an incoherent, open-ended balancing of the inconsistent interests of various groups according to the particular subjective preferences of each individual antitrust judge.<sup>1098</sup> In the late 1980s constitutional and antitrust law have come to be perceived almost as archetypical opposites.<sup>1099</sup> Whereas antitrust analysis in 1890 substantially focused on the protection of basic rights of labor, property, and exchange as a means to attain not only efficiency but also opportunity, prosperity, justice, and freedom, leading present-day analysts have promoted an antitrust law focused solely on efficiency and have found little or no place for rights-based analyses of the sort generally still conceded to be relevant in constitutional jurisprudence.<sup>1100</sup>

In the later twentieth century, none of the differing "schools" of antitrust analysis and practice can accept even implicitly the full formative era vision of a natural, harmonious, rights-based economic order simultaneously tending to maximize opportunity, efficiency, wealth, fairness, and political freedom through the aid of "nondiscretionary" judicial elaboration. Over time, this original theoretical vision fragmented, as a belief that all these elements were interdependent and simultaneously essential increasingly gave way to a perception of conflict among these principles. Antitrust analysts now commonly accept the inevitability of "tradeoff" choices emphasizing some goals over others. In the wake of this change, various scholars, judges, and enforcement officials have selected from among the various parts of the original whole those elements that have seemed most compelling, and have stressed the historical imprimatur of those particular subparts. Some scholars, wary of the substantial judicial discretion they now perceive to be inherent in any multivalue approach, urge an antitrust law of optimal efficiency alone, under the banner of "consumer wealth maximization."<sup>1101</sup> Other scholars declare that Congress cared primarily, if not exclusively, about distributional questions and subordinated the additional general goals of opportunity, efficiency, wealth maximization,

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1096. *Id.* at 610 (citation omitted).

1097. On the change in economic theory, see generally, for example, Kennedy, *Law in Economic Thought*, *supra* note 105, at 958–67; Rowe, *supra* note 5.

1098. See, e.g., R. BORK, *supra* note 6, at 24–25, 41, 46–47; Arthur, *Workable Antitrust Law*, *supra* note 15, at 1216–19, 1235–36.

1099. See, e.g., Fox, *supra* note 13, at 555.

1100. See generally, e.g., R. BORK, *supra* note 6.

1101. See, e.g., *id.* at 90–91.

and political freedom when it passed formative era antitrust legislation.<sup>1102</sup> Still other analysts are more willing to accept substantial judicial discretion in order to preserve an antitrust law that simultaneously does pursue opportunity, efficiency, prosperity, fairness, and political freedom.<sup>1103</sup> Yet even these scholars implicitly or explicitly have tended to view these concerns largely as independent, separate “economic” and “noneconomic” goals<sup>1104</sup> rather than as intrinsic components of a coherent whole of the sort posited in nineteenth century theory. Recently, still other scholars have despaired of the outcomes of an antitrust law focused on questions of broad general goals at all, and have advocated an alternative “statutory” approach to modern adjudication, relying more narrowly on congressional debate denunciations of specific types of conduct.<sup>1105</sup>

As the centennial of the Sherman Antitrust Act draws near, antitrust scholars, judges, and practitioners continue to seek coherent approaches to antitrust law within an economic and intellectual environment that differs greatly from the economic and intellectual environment of the formative era itself. Because the basic principles of political liberalism and classical economic thought provided a powerful, widely accepted conceptual framework for early antitrust reasoning, the current embrace of late twentieth century theory in antitrust analysis cannot be deemed merely the injection of science into an intellectual vacuum, providing a theoretical underpinning for antitrust prohibitions that originally lacked one.<sup>1106</sup> For the same reason, the application of modern theory cannot be considered simply a more detailed extrapolation of a theory already essentially accepted in a less detailed form in 1890. The changes in general theory that have occurred since 1890, however, are so fundamental and so pervasively accepted that it appears impossible now to adopt an “original intent” jurisprudence embracing the full range of formative era hopes and assumptions, premised as they were on late nineteenth and early twentieth century theoretical perspectives.

Within these constraints, the challenge facing modern interpreters and enforcers of formative era antitrust legislation remains the formulation and application of an approach reasonably faithful to the animating economic, moral, and political concerns of that initial period of antitrust legislation and adjudication. As scholars, judges, and practitioners seek to meet this challenge in the opening years of the Sherman Act’s second century, enhanced understanding of the nature, vigor, and difficulties of the changing theoretical visions that have played a central role in antitrust analysis from the very beginning will remain a highly important consideration. It is to such greater appreciation of the historical role of general theory in antitrust analysis that this Article has sought to contribute.

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1102. See Fisher & Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1580, 1592 (1983); Lande, *supra* note 15, at 68–69.

1103. See, e.g., Fox & Sullivan, *supra* note 9.

1104. See, e.g., Hovenkamp, *Antitrust Policy*, *supra* note 9, at 242 (discussing this tendency).

1105. See generally Arthur, *Farewell*, *supra* note 12; Arthur, *Workable Antitrust Law*, *supra* note 15; Clark, *supra* note 15.

1106. See May, *supra* note 4, at 589–92. On the recent scholarly tendency to minimize the role of general theory in early antitrust analysis, see also *supra* text accompanying notes 5–7.

